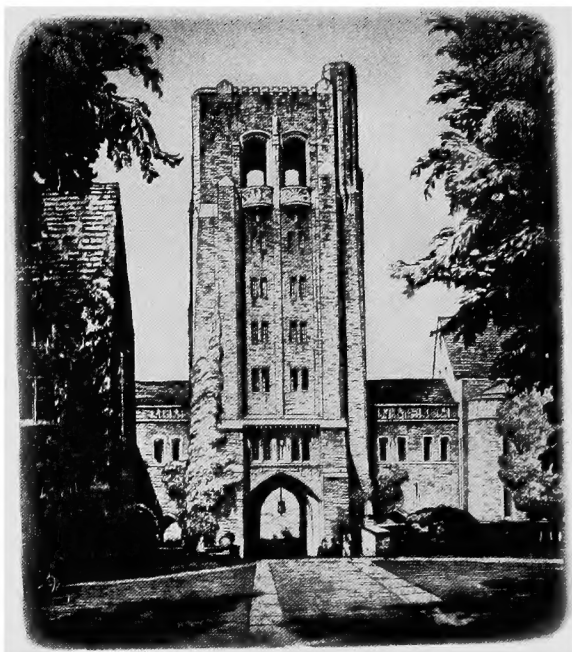


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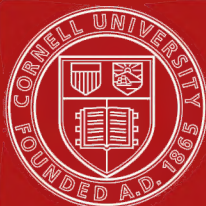
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A
TREATISE
ON THE
LAW OF CARRIERS
OF
GOODS AND PASSENGERS,
BY LAND AND BY WATER.

BY JOSEPH K. ^{INNISBURY}
~~ANGELL~~.

FIFTH EDITION,
REVISED, CORRECTED, AND ENLARGED.

BY JOHN LATHROP,
OF THE BOSTON BAR.

"The first principles of jurisprudence are simple maxims of reason, of which the observance is immediately discovered by experience to be essential to the security of men's rights, and which pervade the laws of all countries. An account of the gradual application of these original principles, first to more simple, and afterwards to more complicated cases, forms both the history and theory of law."—SIR JAMES MACKINTOSH.

BOSTON:
LITTLE, BROWN, AND COMPANY.
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CAMBRIDGE:

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TO

HIS ESTEEMED FRIEND,

JOHN CARTER BROWN, Esq.,

THIS THIRD EDITION

IS RESPECTFULLY INSCRIBED

BY THE AUTHOR.

PREFACE

TO THE FIFTH EDITION.

FIVE hundred cases have been added to this edition. The new matter, amounting to forty-four pages, has been incorporated with the additions made by me in the previous edition, and the whole printed in notes designated by the letters of the alphabet, while the notes of the author are designated by numerals. The previous edition contained, in the Appendix, a collection of the Statutes of the United States regulating passenger vessels and Steamboats; but, as these Statutes have been lately revised and published in a form readily accessible, it has not been considered necessary to reprint them.

JOHN LATHROP.

MAY, 1877.

PREFACE

TO THE FOURTH EDITION.

SINCE the third edition of this work was published, in 1857, the Law of Carriers has been so much considered by the courts, that I have found it necessary, in order to bring the work down to the present time, to add sixty pages of new matter, containing over one thousand cases not cited in the previous edition. By adopting a uniform system of abbreviating the names of the reports, I have been able to add this large amount of new matter without increasing the size of the work.

This being the first edition published since the death of the author of the work, I have added the new matter in the form of notes, separated from the old by a line, and have left the original text untouched.

JOHN LATHROP.

FEBRUARY, 1868.

PREFACE

TO THE FIRST EDITION.

It is not thought requisite to tender an elaborate apology for presenting to the public a work upon a subject of so great importance as the Law of Carriers of Goods and Passengers, as it is believed that it must with the public be a desideratum, that a subject of jurisprudence so practical as this, and one so intimately connected with the common and daily concerns of life, should not only be settled as precisely and as uniformly as possible, but should be generally understood. The annals of navigation and commerce, and the records of commercial jurisprudence, attest the importance of the law of common carriers by land and by water, and it is doubted if there is any other branch of this department of jurisprudence which so naturally tends to awaken a desire in the community at large to become enlightened in relation to it. But since the commencement of the present century, and more especially since American inventive genius has rendered the accelerative and reliable agency of *Steam* subservient to the transportation of commodities and of travellers, the legal duties, liabilities, and rights of public carriers of both things and persons have become subjects of vastly more interest and greater moment than, before this era, was realized or even generally anticipated. This era was soon succeeded by the event of the introduction of the expeditious, commodious, and now common means of commercial transportation, and mercable and social intercourse by land ; and so instrumental have *Railroads* proved, in combination with the employment of the agency just mentioned, in cementing in this connection and

dependence sections of country far removed from each other, that the interest of the mercantile and travelling public, and more especially of the legal profession, in the direction of the subject of the following work, has attained its *acme*. And yet, the only works professing to treat of the subject, and devoted entirely to its exposition, which the author has been able to meet with, are two productions by English authors, one by Jeremy, and the other by Jones,¹ the first of which appeared in the year 1815, and the other in the year 1827.

It must be obvious that neither of these productions is at all adequate to answer present wants, whatever merit may be justly ascribed to them, and however valuable they may have been at the time of their publication. The late learned Mr. Justice Story, in his well-known and highly valued "Commentaries on the Law of Bailments," has indeed treated upon the subject, but then he has done so by considering it only as a branch of his general subject, and of course his exposition of the Law of Carriers is not nearly so comprehensive and satisfactory as it would have been, had he considered it independently or by itself.

The object of the author has been to consider the law on the subject proposed as it now is, and at the same time to point out such discrepancies as he has discovered to have occurred, in the course of the gradual adaptation, by judicial tribunals, of leading principles to the vastly multiplied exigencies of commerce and of society. In the exemplification of these principles, he has been impressed with a sense of the propriety, in many instances, of giving an expanded outline of the facts contained in an adjudged case. In general, the cases are consistent with each other in so far as regards a recognition of, and disposition to respect, the fundamental doctrines which have been so happily and ingeniously delineated by Sir William Jones, and by the late learned Mr. Justice Story, as the foundation of the general law of bailments; but yet, the decided cases, as reported, have individually, in respect to the facts which

¹ George Frederick Jones.

characterized them, points of divergement, which, while the common elementary chain referred to is essentially preserved, have frequently rendered them entirely *sui generis*.

In the case of *Coggs v. Bernard*,¹ Lord Chief Justice Holt, in his exposition of the Law of Bailments, clearly sets forth the principles on which the Law of Carriers rests. This learned judge not only earned the reputation of considering justice as a cardinal virtue, and not as a *trade for maintenance*,² but it has been recorded of him by a contemporary, that “his *dicta* and *responsa* might in general be regarded as text law, as those of Paulus, Ulpian, and Papinian, in the Roman Digest.”³ As a well-ordered exposition of the Law of Bailment and of Carriers, his argument in the case referred to has rendered it a *leading* case on the subject, and has given it a rank among the most celebrated ever decided in Westminster Hall.⁴ No higher eulogium can be pronounced upon it than that expressed by Sir William Jones, when he is content that his own admirable Essay on Bailments shall be considered merely as a commentary upon it;⁵ and yet Sir William Jones has differed somewhat with him in regard to the division of the subject of bailments.⁶

Many doubts and intricacies have arisen from the attempts of common carriers to claim privileges and exemptions which are contrary to the theory of the law, as understood in the case of *Coggs v. Bernard*, and in subsequent and even contemporaneous cases. As has been said by a learned English judge of modern

¹ See *infra*, § 2.

² See the *Tattler*, No. 14.

³ Preface to the reports of cases determined by Lord Chief Justice Holt, from 1688 to 1710: London, 1738. There was in Lord Holt “a clearness and perspicuity of ideas when he defined; a distinct arrangement of them when he divided his subject; and the natural difference of things was made obvious when he distinguished between matters which form an untrue resemblance of each other. Having thus rightly formed his premises, he hardly ever erred in his conclusions.” *Ibid*.

⁴ 1 Smith, *Lead. Ca.* 95.

⁵ See “*Lives of Eminent Judges*,” London, 1846, p. 135.

⁶ See *infra*, Chap. I. § 13.

times, "Carriers are constantly endeavoring to narrow their responsibility, and I am not singular in thinking their endeavors ought not to be favored."¹ This remark was made in reference to the attempted evasion of the full Common-Law responsibility of common carriers, by their assuming an abridgment of it by public *notices* to this effect; in other words, by their assumption of the responsibility only of *special* contractors. There have been comparatively but few cases of this sort in our American courts, but yet the question whether common carriers have the right to abridge their responsibility as such, in the way referred to, has been very seriously considered in this country. We refer the reader to the cases noticed in Chapter VII. of the present work.

That there are defects in the following work the author is not so presumptuous as to gainsay. Errors he has studiously endeavored to avoid, but should any of importance be discovered, notwithstanding the care which has been observed, he may betake himself, against too severe assault of censure, to the partial shelter of an old reporter, (of no great credit for accuracy,) who thus speaks to his readers: "The errata may be not important, or uneasy to be corrected in the reading; wherein, if you be intent, you may find a reasonable *reciprocation*; your judgment may correct the erratas of the book, and the book perchance correct somewhat in *your* judgment; and then you have acted mutual kindness, each to the other."²

To conclude, the author is aware that he has imposed upon himself an arduous undertaking; but he hopes that he may be rewarded, at least with the knowledge that he has succeeded, in a tolerable degree, in abridging the labors and in guiding the inquiries of the profession, and of others whose interest or curiosity may prompt them to be conversant with the subject of any portion of his work.

PROVIDENCE, April 20, 1849.

¹ Mr. Justice Burrough, in *Duff v. Budd*, 3 Bro. & Bing. R. 177.

² Pref. to Latch, Reports and Cases, En la Court de Bank le Roy, 1662.

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TREATISE

ON THE

LAW OF CARRIERS.

CHAPTER I.

PRELIMINARY VIEW OF THE LAW OF BAILMENTS.

§ 1. ANY person undertaking gratuitously to convey for another person goods, chattels, &c., is called, in the civil law, *mandatarius*, and by the writers and commentators on the common law, the *mandatary*; and the person who, for such purpose, employs him, is, in the language of the civil law, *mandans* or *mandator*, or director or employer. But the persons who constitute the most numerous class of carriers are those who undertake to carry for another for hire or reward. Every person who accepts goods or money to be carried to a particular destination for reward, paid or agreed to be paid him for the carriage of them, impliedly lets out his labor and care in return for the reward; and the contract belongs to the class *Locatio Operis*, which was styled by the Roman Jurists *Locatio Operis Mercium Vehendarum*, or the letting out of the work of carrying merchandise. The owner of the merchandise, who delivered it to the carrier to be carried, was the letter of the work of carrying, and he was also at the same time the hirer of the labor and services of the carrier; whilst, on the other hand, the carrier was both the hirer of the work of carrying and the letter of his own labor and services, to be employed with care about the conveyance of the merchandise. Of this description of carriers there are known in the common law two kinds, viz., private carriers and public carriers; the latter being usually denominated common carriers, and being by far the most numerous and most important class of paid carriers.

§ 2. By the common law, the liabilities resulting from the delivery of goods to a carrier of either of the above-mentioned descriptions, to be carried, forms an important part of the law of bailments. Indeed, of all the various contracts that belong to the head of bailment, that between a carrier and his employer is by far the most important, extensive, and useful. But there is high authority for the propriety of directing attention to the law of bailment in general for a just comprehension of that portion of it to which persons acting especially in the capacities of carriers are subject. Lord Chief Justice Holt, in giving judgment, with much consideration, in the celebrated case of *Coggs v. Bernard*, upon a question involving the principle of responsibility for the safe conveying of goods, deemed it proper, in order "to show the grounds upon which a man shall be charged with the goods put into his custody, to show the several sorts of bailments;" and this, says he, he did, "not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust."¹ If it be required, then, in the opinion of one of so high authority, of a judge, to proceed in the mode thus suggested, to be enabled to arrive at a satisfactory conclusion upon a single propounded question involving the principle of the legal liability of carriers, how much to be respected is the suggestion by an author professing to consider every question which has been propounded to the courts of common law on that subject, from the earliest to the latest adjudged case. It thus seems, as it were, imperative, before commencing to treat, as is now proposed, of the law of carriers as a distinct and independent subject, to show the several sorts of bailments, and to give a compendious view of that more general branch of the law to which the decisions in respect

¹ *Coggs v. Bernard*, 2 Ld. Raym. 909. In this case Lord Chief Justice Holt seems to have traced with great attention the subject of bailments, and he cites many passages from Bracton which he has nearly copied from Justinian. The report of this case in the first volume of the Reports of Sir John Comyns, p. 133, is not near as full and satisfactory as the report in Lord Raymond's Reports, just referred to. The learned editor of Coke

upon Littleton, speaking of Lord Holt's argument in this case, says: "Lord Chief Justice Holt's argument in that case, as reported by Lord Raymond, particularly merits attention, it being the most masterly view of the whole subject of Bailment." Harg. Co. Litt. 89 b, n. 3. Abridged reports of different parts of Lord Holt's opinion are in Holt's Reports, 13, 131, 528.

to the legal liability of a carrier have reference ; and it is intended, in so doing, to have free recourse to the profound legal erudition and philosophical labors both of Sir William Jones¹ and the late learned Mr. Justice Story.²

§ 3. Sir William Jones, it may be premised, has expressed his astonishment at the fact, that so important a branch of jurisprudence as the title "bailment," in the English law, should have, from the reign of Elizabeth to the reign of Anne, produced more contradictions and confusion, more diversity of opinion and inconsistency of argument, than any other part of judicial learning equally simple.³

§ 4. To begin with the definition of the term "bailment." It is derived from the French word *bailler*, which signifies to deliver ;⁴ and it is a compendious expression to signify a contract resulting from delivery.⁵ Sir William Jones has defined bailment to be "a delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered."⁶ In another part of his essay he offers a definition in language somewhat different, saying, "a delivery of goods in trust, on a contract, express or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use, for which they were bailed, shall have elapsed or be performed."⁷ Blackstone has defined bailment to be "a delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee ;"⁸ and again, a "delivery of goods to another person for a particular use."⁹ Story, without professing to enter into a minute criticism, thinks it may

¹ An Essay on the Law of Bailments, by Sir William Jones (4th Eng. ed.).

² Commentaries on the Law of Bailments, with Illustrations from the Civil and Foreign Law, by Joseph Story, LL.D., one of the Justices of the Supreme Court of the United States, and Dane Professor of Law in Harvard University (4th ed., 1846).

³ Jones on Bailm. 2, 3.

⁴ 2 Bl. Com. 451. "It may be observed," says Sir William Jones, "that this is the only contract to

which the French (from whom our word *bailment* was borrowed) apply a word of the same origin ; for the letting of a house or chamber for hire is by them called *bail à loyer*, and the letter for hire *hailleur*, that is, *bailor*, both derived from the old word *bailler*, to deliver." Jones on Bailm. 90.

⁵ Story on Bailm. § 2.

⁶ Jones on Bailm. 1.

⁷ Ibid. 117.

⁸ 2 Bl. Com. 451.

⁹ Ibid. 395.

be said, that "a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust."¹ Kent may be considered to have blended, in some measure, the definitions of Jones and Blackstone,² and he refuses to apply the term "bailment" to cases in which no return or delivery, or redelivery to the owner or his agent, is contemplated. "Bailment," he says, "is a delivery of goods in trust, upon a contract, express or implied, that the trust shall be duly executed, and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered."³ In

¹ Story on Bailm. § 2, p. 4 (4th ed.).

² So Story thinks. Story on Bailm. *ub. sup.*

³ 2 Kent, Com. 558. In *Les Termes de la Ley*, first published in 1563, there appears the following definition of bailment, and one which shows that the principles of this branch of the law were not as above stated in the text, at so late a period as that between the reigns of Elizabeth and Anne, clearly understood. The definition is,—"Bailment is a delivery of things, whether writings, goods, or stuff, to another; sometimes to be delivered back to the bailor, that is, to him that so delivered it; sometimes to the use of the bailee, that is, of him to whom it is delivered; and sometimes also, it is delivered to a third person. This delivery is called a bailment." This definition is considered singularly loose and unsatisfactory, and, considering the recognized accuracy of the work from which it is cited, it is corroboratory proof that, at the time the above-named work was first published, the principles of this branch of the law were not very clearly understood; for it mentions as a class of bailments, distinct from those in which there is to be a redelivery to the bailor, or a delivery to a third person, the case of goods delivered to the use of the bailee; but in all such cases there must be a trust to redeliver

to the bailor, or to deliver to a third party, or there would be no bailment; the last-mentioned class is also very incorrectly worded,—"Sometimes, also, it [*query* what?] is delivered to a third person." If this be taken to mean that the subject-matter of the bailment is delivered to a third person, he would be the *bailee*: but the meaning must be (though the original French—" *Il est deliver à un tierce person*"—will hardly warrant that construction), that the thing bailed is to be delivered by the bailee to a third person. See English Monthly Law Magazine for April, 1839. Where a contract was made between a miller and other persons, by which the former agreed to take from the latter wheat, and give them one barrel of flour for every four bushels and thirty-six pounds of wheat, it was held, that the contract was one of sale, and not of bailment; and that the destruction of the wheat after its delivery, by the burning of the mill, was the loss of the miller, and was no defence to an action for the price. *Baker v. Woodruff*, 2 Barb. 520. A contract signed by a party upon receiving the possession of personal property, and containing his promise to pay for the same, is not a bailment. *Bryant v. Crosby*, 36 Maine, 562. And for the distinction between a contract of sale and a bailment, see *Mallory v. Willis*, 4 Comst. 76.

these definitions, it will be observed, bailment is called a contract; and although it has been thought by some, whose opinions are entitled to consideration and weight, that in some of the species of bailment contract does not subsist;¹ yet that term is used, when speaking of bailment generally by courts and judges, without reference to the distinction of its several species.²

§ 5. It is obvious, from the foregoing definitions, that the law of bailments involves what Sir William Jones calls "the great question of responsibility for neglect," a question upon which Blackstone speaks so loosely and indeterminately that no fixed ideas can be collected from his words; though his Commentaries are the most correct and beautiful outline that ever was exhibited of any human science.³ Before considering, therefore, the different kinds of bailments, this great question, which is of the utmost importance in illustrating the law of carriers, demands attention. From the obligation contained in the definition of bailment, to restore the thing bailed at a certain time, it follows that the bailee (a carrier, for instance) must keep it, and be responsible to the bailor (the person, for instance, by whom a carrier is employed⁴) if it be lost or damaged; but as the bounds of justice would, in most cases, be transgressed, if he were made liable for the loss of it without his fault, he can only be obliged to keep it with a degree of care proportioned to the nature of the bailment; and the investigation of this degree, in every particular contract, is the problem which involves the principal difficulty.⁵

§ 6. As to the various degrees of care or diligence which are recognized in the law, Sir William Jones, with his characteristic acuteness, says, "that there are infinite shades, from the slightest momentary thought or transient glance of attention to the most vigilant anxiety and solicitude. But extremes," he says, "in this case, as in most others, are inapplicable to practice; the first

¹ See an able article by the late Mr. J. B. Wallace, of the Philadelphia bar, in the *American Jurist* for 1837, vol. xiv. pp. 253 to 285.

² See *post*, note to § 19; and, in particular, *post*, § 23. *Storer v. Gowen*, 18 Maine, 174. *Marshall v. York R.* 11 C. B. 655, 7 Eng. L. & Eq. 519. *Smith v. Nashua R.* 7 Fost. 86. *Covill v. Hill*, 4 Denio, 323. Whether

a bailment or a sale, see *Mallory v. Willis*, 4 Comst. 76, and on p. 85, by *Bronson, J.*; *Litchfield v. White*, 3 Sandf. 545. For a distinction between sale and bailment, see *Law Rep.* for June, 1852.

³ Jones on Bailm. 3.

⁴ *Ibid.* 5.

⁵ *Ibid.* 6.

extreme would seldom enable the bailee to perform the condition, and the second ought not in justice to be demanded; since it would be harsh and absurd to exact the same anxious care, which the greatest miser takes of his treasure, from every man who borrows a book or a seal. The degrees of care to be sought, then, must lie somewhere between these extremes; and, by observing the different manners and characters of men, a certain standard may be found, which will greatly facilitate an inquiry; for, although some persons are excessively careless, and others extremely vigilant, and some through life, and others only at particular times, yet it is perceptible that the generality of rational persons use nearly the same degree of diligence in the conduct of their own affairs. This care, therefore, which every person of common prudence, and capable of governing a family, takes of his own concerns, is a proper measure of that which would uniformly be required in performing every contract, if there were not strong reasons for exacting in some of them a greater, and permitting in others a less, degree of attention. "Here, then," says Sir William Jones, "we may fix a constant determinate point, on each side of which there is a series consisting of variable terms, tending indefinitely towards the above-mentioned extremes, in proportion as the case admits of indulgence or demands rigor: if the construction be favorable, a degree of care less than the standard will be sufficient; if rigorous, a degree more will be required; and in the first case, the measure will be that care which every man of common sense, though absent and inattentive, applies to his own affairs; in the second, the measure will be that attention which a man remarkably exact and thoughtful gives to the security of his personal property."¹

§ 7. Story thinks that, although it may not be possible to lay down any very exact rule, applicable to all times and all circumstances, yet that may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs, in the age and country in which they live; and this he affirms to be more a matter of fact than of law;² and the later decisions hold, that it must often be left to the jury upon the nature of the subject-matter, and the particular

¹ Jones on Bailm. 5, 6.

² Story on Bailm. § 11. And see *Vaughn v. Menlove*, 3 Bing. N. C. 468.

circumstances of each case.¹ The variable character of the standard of diligence is very happily illustrated by Story. In one country, or in one age, says he, acts may be deemed negligent which, at another time, or in another country, may justly be deemed an exercise of ordinary diligence; and it is important, says he, to attend to this consideration, not merely to deduce the implied obligations of a party in a given case, but also to possess ourselves of the true measure by which to fix the application of the general rule. Thus, in times of primitive or pastoral simplicity, when it was customary to leave flocks to roam at large by night, it would not be want of ordinary diligence to allow a neighbor's flock, which is deposited with us, to roam in the same manner. But, if the general custom were, at night, to pen them in a fold, it would doubtless be a want of such diligence not to do the same with them. In many parts of America, especially in the interior, where there are, comparatively speaking, few temptations to theft, it is quite usual to leave barns, in which horses and other cattle are kept, without being locked by night. But in cities, where the danger is much greater, and the temptations more pressing, it would be deemed a great want of caution to do the same. If a man were to leave his friend's horse in his field, or in his barn, all night, in many country towns, and the horse were stolen, it would not be imagined that any responsibility was incurred. But if, in a large city, the same want of precaution were shown, it would be deemed, in many cases, gross neglect. If robbers were known to frequent a particular district of country, much more precaution would be required than in districts where robberies were of very rare occurrence. What, then, is usually done in a country, in respect of things of a like nature, whether it be more or less in point of diligence than what is exacted in another country, is in fact the general measure of diligence.²

§ 8. The customs of trade and the course of business also have an important influence. If, in the course of a particular trade, particular goods, as for instance coals, are usually left on a wharf without any guard or protection during the night, and they are stolen, the wharfinger, or other person having the custody, might not be responsible for the loss, although, for a like loss of other

¹ Per Shaw, C. J., in *Whitney v. Lee*, 8 Met. 91. And see *Cairns v. Mills*, 8 M. & W. 238.

² Story on Bailm. §§ 11-15.

goods not falling under a like predicament, he might be responsible. If a chaise were left during the night under an open shed, and were stolen, the bailee might not be liable for the loss, if such was the usual practice of the place; and yet he would be, if other precautions were usually taken. In short, diligence is usually proportioned to the degree of danger of loss, and that danger is, in different states of society, compounded of very different elements.¹ What constitutes ordinary diligence may also be materially affected by the nature, bulk, and value of the articles. A man would not be expected to take the same care of a bag of oats as of a bag of gold; of a bale of cotton as of a box of jewelry; of a load of wood as of a package of paintings; of a block of marble as of a sculptured statue. The value, especially, is an ingredient to be taken into consideration upon every question of negligence; for that may be gross negligence in the case of a parcel of extraordinary value, which, in the case of a common parcel, would not be so.²

§ 9. The fixed mode or standard of diligence Sir William Jones calls ordinary. The degrees on each side of this standard need not, he says, be distinguished by any precise denomination; the first may be called less, and the second more than ordinary diligence. Then he proceeds to say, that just in the same manner there are infinite shades of default or neglect, from the slightest inattention, or momentary absence of mind, to the most reprehensible supineness and stupidity; and these are the omissions of the before-mentioned degrees of diligence, and are exactly correspondent with them.³

§ 10. The three degrees of negligence are thus distinguished, both in the civil and the common law, by name: 1. Gross neglect, *lata culpa*, as the Roman lawyers call it, is in practice considered as equivalent to fraud; and consists, according to Sir William Jones, in the omission of that care which even inattentive and thoughtless men never fail to take of their own property; this fault the best interpreters of the civil law hold to be clearly a violation of good faith.⁴ 2. Ordinary neglect, *levis culpa*, is the

¹ See *Gordon v. Hutchinson*, 1 Watts & S. 285.

² Story on Bailm. §§ 13-15.

³ Jones on Bailm. 7, 8. Story on Bailm. § 17.

⁴ Jones on Bailm. 21. Story on Bailm. § 18. Story remarks that, in various passages of the Essay of Sir William Jones, it seems to be assumed that, in the common law as in the

want of that diligence which the generality of mankind use in their own concerns, that is of ordinary care.¹ 3. Slight neglect, *levissima culpa*, is the omission of that care which very attentive and vigilant persons take of their own goods, or, in other words, of very exact diligence.²

civil law, gross negligence and fraud are equivalent. Thus, he observes, ordinary negligence is spoken of as "a mean between fraud and accident" (p. 8); gross negligence as "inconsistent with good faith" (pp. 10, 46, 119); and a bailee without reward, as being "answerable only for fraud, or for gross negligence, which is considered evidence of it" (p. 46). But this doctrine is not warranted by the common-law authorities. One case opposed to it is put by Sir W. Jones himself. If, he says (p. 57), a depositor commits a gross neglect in regard to his own goods, as well as those which are bailed, by which both are lost or damaged, he cannot be said to have violated good faith, and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person. So, where a cartoon was left in the hands of an auctioneer, without any particular agreement to take care of it, or redeliver it safe, and without any agreement for a reward, and it appeared that the painting was upon paper pasted on canvas, and that the bailee kept it in a room next to a stable in which there was a wall, which had made it damp and peel, — it was held gross neglect, and the bailee was held responsible, although there was no imputation of fraud. These cases show that gross negligence is not equivalent to fraud according to the common-law authorities. On the contrary, gross negligence is, or at least may be, entirely consistent with good faith and honesty of intention; and to confound it with fraud would be most mischievous, for then, unless a jury should believe the

party guilty of fraud, no laches would come up to the legal notion of gross negligence, so as to entitle the sufferer by the loss to recover. A man may leave a casket of jewels or a purse of gold upon the table of a public room at an inn, or may leave a package of bank-bills in a greatcoat in the common entry of an inn, from pure thoughtlessness; and a jury might be well satisfied that it was gross negligence. But if fraud were a necessary ingredient, the very statement of the case would negative a right of recovery. Besides, if gross negligence were equivalent to fraud, there could be no defence set up by the bailee, founded either on his own conduct in respect to his own goods, or on a special contract not to be liable for gross negligence. But there is no principle in our law that would prevent a depositary from contracting not to be liable for any degree of mere negligence. Story on Bailm. § 20 *et seq.* With respect to common carriers, however, fraud may be presumed, as will be shown, *post*. Gross negligence certainly approximates to *dolus malus*, and is tantamount, in the mischief it produces, to a breach of good faith. It bears so near a resemblance to fraud as to be equivalent to it in its effect upon contracts, though by the common law it may not be fraud by inference, but a matter of fact for the jury. 2 Kent, Com. 559. *Foster v. Essex Bank*, 17 Mass. 479. *Wilson v. York R.* 11 Gill & J. 58. And see especially *post*, § 22 *et seq.*

¹ Jones on Bailm. 22. Story on Bailm. § 18.

² *Ibid.*

§ 11. Such, then, are the nature and various degrees of negligence and of diligence, and the next question is, in what manner the law applies them. The answer is as short and simple as it is rational. When the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, and he is consequently responsible for nothing less than gross neglect. When the bailment is for the sole benefit of the bailee, an extraordinary degree of care is demanded, and the bailee is therefore responsible for slight neglect. When the bailment is reciprocally beneficial to both parties (as in the case of the carriage of goods for hire), such care is exacted of the bailee as every prudent man commonly takes of his own goods; or, in other words, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect. Such are the rules recognized by the common law; a like division of the degrees of responsibility is to be found in the civil law; and the same rules are found in the French and Scotch law, and may be deemed, indeed, the general result of the law of Continental Europe.¹ But it is often difficult to mark the lines of distinction between the different degrees of negligence, so as to show precisely where the one ends and the other begins; and, therefore, by the common law, it is left to the jury, upon the nature of the subject-matter and the particular circumstances of each case, to say whether the particular case is within the one or the other.² Every person who is a bailee, whether for hire or not, is bound to take proper and prudent care of that which is committed to him; and the courts, in modern times, have acknowledged the difficulty in defining the difference between one of the sorts of the negligence designated by the epithets of the civil law and another;³ and there is clearly a want of precision in the use of the term "negligence," which, *per se*, is insufficient to express the distinction between negligence in law and negligence in fact.⁴ From these principles it, however, follows that bailees in general are not responsible for losses resulting from unavoidable accident, or from

¹ Jones on Bailm. 22-24. Story on Bailm. §§ 23, 24. Coggs v. Bernard, 2 Ld. Raym. 909. Pothier, Traité de Depot, n. 23. Pothier, Oblig. P. 1, ch. 2, art. 1, § 1, n. 141. 1 Bell, Com. (5th ed.) 453. Ersk. Inst. 448.

Heinec. Elem. Jur. Inst. Lib. 3, tit. 15, § 12.

² See Opinion of Shaw, C. J., in Whitney v. Lee, 8 Met. 91. And see *ante*, §§ 7, 8.

³ See *post*, §§ 22, 23, and §§ 48-52.

⁴ *Ibid*.

irresistible force; and yet (as will be shown in treating of the particular liability of carriers) bailees may become so responsible, both by special contract and by the special policy of the law.

§ 12. It may here be proper to notice the distinction between negligence and misfeasance. It seems to be this, — that the former takes place in the course of performing the contract, the latter in an act done in direct contravention of it, by which its performance is prevented. An instance of the latter is, where the defendants received a parcel, and contracted to send it by the mail, and it was sent in a different manner (by another coach), and was lost. The court held, that, if the defendants had forwarded the parcel by the mail, in pursuance of the contract, they would not have been liable for the loss, but, as they had acted in direct contravention of it, it was a misfeasance.¹ If a gratuitous bailee enters upon the performance of the safe-keeping of the thing intrusted to him, and in the execution of it does it amiss, through the want of due care, by which damage ensues to the bailor, it is a misfeasance, for which an action will lie; but if a person engages that he will gratuitously take charge of a thing, and then wholly omits to enter upon the execution of his promise, it is a nonfeasance, for which, at common law, no action will lie.²

§ 13. As before mentioned,³ Lord Holt, in *Coggs v. Bernard*,⁴ has traced with much attention the different species of bailment; which, it will at once be perceived, are derived from the civil law, to which Bracton had recourse in expounding the law of bailment;⁵ and by the elaborate opinion of that learned judge,

¹ *Sleat v. Fagg*, 5 B. & Ald. 342. See, also, *Ellis v. Turner*, 8 T. R. 531; *Garnett v. Willan*, 5 B. & Ald. 53. The performance, in an improper manner, place, or time, which it is not the party's right or even duty to do, is a misfeasance; as, for example, the captain of a military company drilling his men and ordering them to fire in public squares, and business resorts of towns and villages. *Childress v. Yourie*, 1 Meigs, 564. *Cole v. Fisher*, 11 Mass. 137. And see *Glover v. North Staffordshire R.* 16

Q. B. 912, 5 Eng. L. & Eq. 335; and *post*, § 269.

² *Thorne v. Deas*, 4 Johns. 85. And see *post*, note to § 19; and for a more full explanation of the distinction between negligence and misfeasance, see *post*, §§ 269–274.

³ See *ante*, § 2.

⁴ *Coggs v. Bernard*, 2 Ld. Raym. 909.

⁵ See Bracton and the Civil Law referred to by Lord Holt in *Coggs v. Bernard*, *ub. supra*. See also Wood, Civil Law, 235; 1 Domat, B. 1, tit.

in the case just referred to, and by the essay of Sir William Jones, the different sorts of bailment in the civil law have become transferred to the common law.¹ The division of bailments, by the above-mentioned judge, is into six sorts; but this division has since been considered somewhat inaccurate, because, in fact, his fifth division is no more than a branch of his third; and he might, with equal reason, have added a seventh, since the fifth is capable of another subdivision.² The common law, as now understood and applied, recognizes but five general species of bailment, which may be thus enumerated and defined, with all the Latin names, one or two of which Lord Holt has omitted: 1. *Depositum*, or Deposit, which is a naked bailment, without reward, of goods to be kept by the bailor, and to be returned when the bailor shall require it. The appellation and the definition are both derived from the civil law. *Depositum est, quod custodiendum alicui datam est* (Dig. Lib. 16, tit. 4, l. 1). 2. *Mandatum*, or Mandate, which is defined to be a bailment of goods without reward, to have some act performed about them, or to be carried from place to place. This appellation is also derived from the civil law. *Mandantis tantum gratiâ intervenit mandatum*, is the language of the Institutes;³ *Mandatum, nisi gratuitum, nullum est*, is that of the Pandects.⁴ 3. *Commodatum*, or loan for use, when goods are bailed without pay, to be used for a certain time by the bailee.⁵ It differs from what is called in the civil law a *Mutuum* in this, — that in a *Commodatum* the goods are lent to be specifically returned; in a *Mutuum* the goods are to be consumed, and are to be repaid in property of the same kind. Thus, corn or wine, delivered to some one to be consumed, and to be repaid in kind, is a case of *Mutuum*; but if a horse be gratuitously lent for a journey, it is a case of *Commodatum*. 4. *Pignori acceptum*,

4, § 1; 1 Bell, Com. 452 (5th ed.); 2 Kent, Com. 585; Story on Bailm. § 8.

¹ Story on Bailm. § 8. Jones on Bailm. 36, 117. Lord Holt presided as lately as the second year of Queen Anne; and a point which the first elements of Roman law have so fully decided, that no court of judicature on the Continent would suffer it to be debated, was thought in England to deserve, what it certainly received,

very great consideration. Jones on Bailm. 58, referring to the opinion of Lord Holt in *Coggs v. Bernard*, *ub. sup.*

² Jones on Bailm. 36.

³ Inst. Lib. 3, tit. 27, § 1.

⁴ Dig. Lib. 17, tit. 1. Story on Bailm. notes 4 and 5 to § 5.

⁵ The same definition is given in the civil law. Story on Bailm. § 6.

when a thing is bailed by a debtor to his creditor, in pledge or pawn, as security for some debt or engagement. 5. *Locatum*, or hiring, which is always for a reward: and this bailment is either, first, *Locatio rei*, by which the hirer gains the temporary use of the thing; or, secondly, *Locatio operis faciendi*, when work and labor, or care and pains, are to be performed or bestowed on the thing delivered; or, thirdly, *Locatio operis mercium vehendarum*, when goods are bailed for the purpose of being carried from place to place for hire, either to a public carrier, or to a private person.

§ 14. The above division of bailments, and the definitions of each sort, are borrowed from the Essay of Sir William Jones on Bailments, and from the Commentaries on the same subject of the late Mr. Justice Story.¹ The latter sort, *Locatum*, or hiring,

¹ See Jones on Bailm. 36; and Story on Bailm. §§ 4-7. Lord Chief Justice Holt's arrangement of bailments into six classes is as follows. 1. Depositum: A bare, naked bailment of goods delivered by one man to another to keep for the use of the bailor. 2. Commodatum: When goods or chattels that are useful are lent to a friend *gratis*, to be used by him. 3. *Locatio rei*: Where goods are lent to the bailee to be used by him for hire. 4. *Vadium*, or Pawn. 5. *Locatio operis faciendi*: Where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee. 6. *Mandatum*: A delivery of goods to somebody who is to carry them or do something about them *gratis*. Sir William Jones objects to this arrangement, because the fifth class (as he says) is no more than a branch of the third, and because a seventh might have been added, since the fifth (and he might have said the sixth also) is capable of another subdivision. But Mr. Smith, in his note to *Coggs v. Bernard*, has refuted this opinion: "For there exists," he says, "between them this essential difference, viz., that, in cases falling under the

third class, or *locatio rei*, the reward is paid by the bailee to the bailor; whereas, in cases falling under the fifth class, or *locatio operis faciendi*, the reward is always paid by the bailor to the bailee." It is true, that in Latin both classes are described by the word *locatio*, which probably gave rise to Sir William Jones's opinion that both ought to be included under the same head. But then in the third class, *locatio rei*, the word *locatio* is used to describe a mode of bailment, viz. by the hiring of the thing bailed; whereas, in the fifth class, *locatio operis faciendi*, the same word *locatio* is used, not to describe any mode of bailment, but to signify the hiring of the man's labor who is to work upon the thing bailed; for as to the thing bailed, that is not hired at all, as it is in cases falling within the third class. If, indeed, Lord Holt had been enumerating the different sorts of hirings, not of bailments, he would, no doubt, like the civilians, have classified both *locatio rei* and *locatio operis* under the word "hiring;" since in one case goods are hired, and in the other labor. But he was making out a classification, not of hirings, but of bailments; and since in cases

which is subdivided by the former writer, as above given, into three sorts, the latter writer, following the civil law, has subdivided into four sorts, thus: 1. The hiring of a thing for use (*locatio rei*). 2. The hiring of work and labor (*locatio operis faciendi*). 3. The hiring of care and services to be performed or bestowed on the thing delivered (*locatio custodiæ*). 4. The hiring of the carriage of goods (*locatio operis mercium vehendarum*) from one place to another. The three last, says the learned American commentator, are but subdivisions of the general head of hire of labor and services.¹

§ 15. But the most general and simple division of bailments, and one which includes all the above-mentioned sorts, is into three kinds. First, those in which the trust is exclusively for the benefit of the bailor. Secondly, those in which the trust is exclusively for the benefit of the bailee. Thirdly, those in which the trust is for the benefit of both parties. The first embraces deposits and mandates; the second, gratuitous loans for use; the third, pledges or pawns, and hiring and letting to hire.² The first of these three general divisions includes the carriage of goods without hire; and the last the carriage of goods for hire, as was stated in the commencement of the present chapter.³ The carriage of goods without hire will be the subject of the following chapter.

§ 16. In the conclusion of the present chapter, it may be stated, that the following chapters will render obvious the truth of the

of *locatio rei* there is a hiring of the thing bailed, and in cases of *locatio operis* no hiring of the thing bailed, it was impossible to place, with any degree of propriety, two sorts of bailments under the same class, one of which is, and the other of which is not, a bailment by way of hiring. As to the objection that Lord Holt's fifth class of bailments is capable of another subdivision, there is no doubt but that it may be split, not only, as Sir William Jones suggests, into *locatio operis faciendi* (where work is to be done upon the goods) and *locatio operis mercium vehendarum* (where they are to be carried), but into as many different subdivisions as there are dif-

ferent modes of employing labor upon goods; and, in point of fact, the civilians, in their division of hirings, enumerated another class, viz., *locatio custodiæ*, or the hiring of care to be bestowed in guarding a thing bailed, which is omitted by Sir William Jones. For these reasons it is submitted that Lord Holt's classification is the correct one." 1 Smith's Lead. Cas. 98. And see English Monthly Law Mag. for April, 1839.

¹ Story on Bailm. § 8.

² Story on Bailm. § 3. And see English Monthly Law Mag. for April, 1839, p. 216.

³ See *ante*, § 1.

general remark, equally applicable in our country, made by Sir William Jones, in the concluding portion of his Essay on the Law of Bailments, viz.: "All the preceding rules and propositions may be diversified to infinity by the circumstances of every particular case; on which circumstances it is, on the Continent, the province of a judge appointed by the sovereign, and, in England, of a jury freely chosen by the parties, finally to decide."¹

CHAPTER II.

OF CARRIERS WITHOUT HIRE.

§ 17. THE law, then, imposes upon a carrier without hire, or the person who undertakes to carry goods for another gratuitously (the mandatary²), the obligation only of slight diligence, and renders him liable only for gross negligence.³ (a) It is of the essence of the contract of mandate, that it be gratuitous, for, if any com-

¹ Jones on Bailm. 122. And see *ante*, §§ 7, 8, 11. "There is no time," it has with truth been said, "when the law is stationary and stable; but it is kept in perpetual movement by the varying condition of the nation, and, therefore, the only way in which the spirit of the law can be seized is to study it historically, to begin with the custom in its cradle, and to follow it through all its changes down to the existing epoch. To borrow an illustration from another science, law not being a fixed quantity, but variable according to a certain rule, it becomes necessary to ascertain what, in mathematical lan-

guage, may be called its fluxions, the formula of its variation. It is history only that can furnish this *calculus*, which is the basis of all true and just science in law. Without this knowledge, a jurist may repeat the words, but can never penetrate the living spirit of the law." See article in 5th vol. of American Jurist, p. 13, entitled, "Written and Unwritten Systems of Laws."

² See *ante*, §§ 1, 13. And see, respecting the general subject of Mandates, chap. iii. of Story on Bailments.

³ See *ante*, §§ 10, 11.

(a) If a carrier in consideration of carrying grain in bags on freight agrees to carry the empty bags of his customers free, the consideration applies to the entire contract, and so, if, instead of a specific agreement, there is a custom to this effect; and he is liable as a carrier for the loss of empty bags. *Pierce v. Milwaukee R.* 23 Wis. 387.

pensation is to be paid, it becomes then the contract for hire. *Mandatum, nisi gratuitum, nullum esse*; and, in this particular, it matters not whether the compensation is express or implied, nor whether certain or uncertain in amount.¹

§ 18. The great leading case in support of the above proposition respecting the responsibility of a carrier without hire is the case of *Coggs v. Bernard*.² In this case the defendant undertook to remove several casks of brandy from one cellar to another, and there lay them down safely, but managed so negligently that one of the casks was staved. After the general issue joined, and a verdict for the plaintiff, a motion was made in arrest of judgment on the irrelevancy of the declaration, in which it was neither alleged that the defendant was to have any recompense for his pains, nor that he was a common porter. But the court were unanimously of opinion that the action lay, and the elaborate judgment of Lord Chief Justice Holt has rendered the case one of the most celebrated ever decided in Westminster Hall.

§ 19. By the argument of Lord Holt in the above case, if the agreement had been executory, as if the defendant had assumed to carry the goods in question, and had failed to do so, no action could have been sustained. It would have been like the case where a man promised another to build him a house by such a day and failed in the performance of the promise, in which case it was adjudged (11 Hen. IV. 33), that an action would not lie. But in the case in question, the defendant actually entered upon the undertaking according to his promise, and therefore was liable to an action for the deceit put upon the plaintiff who trusted him; for, although he was not bound to enter upon the trust, yet if he

¹ Story on Bailm. § 153, and the authority of the Dig. and of Pothier, Pand. there cited. If there is a mere honorary payment, not as a compensation, but as a mark of respect and favor, this, by the civil-law authorities, is still a mandate. In England, counsel are understood not to be at liberty to make any pecuniary charge for their services, for advice, and the compensation given is deemed a gratuity; and their employment, therefore, in the civil law, would be called a *mandate*. Story, *ub. sup.* In a case

where the defendant received hops from the plaintiff for the purpose of being carried for hire, and kept them for the plaintiff in a warehouse for thirteen months, and for that time he had warehouses which before had belonged to another, but had not made any charge to the plaintiff for warehousing; it was held, that he was not a gratuitous bailee. *White v. Humphrey*, 11 Q. B. 43.

² *Coggs v. Bernard*, 2 Ld. Raym. 909.

do enter upon it, he must take care not to miscarry, at least, by any mismanagement of his own. But should a person have run upon the defendant in the street, and thrown down the cask of brandy, or had privately pierced it, it would be otherwise, because the defendant had no reward. In short, although a party is to receive no benefit or reward, if he assumes a trust he is under obligation to perform it.¹

¹ In an article in the American Jurist for January, 1837 (vol. xvi. pp. 253-285), written by the late Mr. J. B. Wallace, of the Philadelphia bar, it is ably contended, that, in *mandate* and in *deposit*, there is no contract at all, expressed or implied; his argument being, that every contract presupposes a sufficient consideration in point of law to sustain it, and that, in the classes of bailment just mentioned, there is no sufficient consideration moving to the bailee, as the bailee acts gratuitously. "It is seen," says he, "that, in pursuance of a most useful practical principle, no action lies against the mandatary for nonfeasance (there being in legal contemplation no contract to do); and it is further seen that, if the mandatary does undertake or begin the execution of his trust, and does it so negligently as to injure the thing bailed, an action does lie against him for this misfeasance. But this right of action is not by virtue of his contract, for no contract exists after he begins to do, more than before. It rests on the broad principles of general justice; it is founded on the tort; it arises not *ex contractu*, nor even *quasi ex contractu*, but *ex delicto*. It would lie equally, if the injury were done to the thing bailed, while in the hands of the mandatary, even before he begins to execute the trust; though generally this cannot practically be, as the injury usually occurs in the execution." This simple explanation, says Mr. W., removes all difficulty, and shows that the form of action is

not *assumpsit*, but *case*; and he is of opinion that, in this view of the matter, "there is no inconsistency, that no principle is violated, and that every thing is congruous." Mr. Justice Story, in reply to the acute reasoning of Mr. W., says: "It seems to me very clear, both upon principle and authority, that, in every case of deposit and of mandate, there is such a contract, founded on a sufficient consideration, and capable of being so enforced (that is, at law), whenever the bailment has been executed by a delivery of the thing to the bailee. In the case of a deposit, no one can doubt that there is an engagement or promise to redeliver the thing to the bailor. The latter parts with his possession of it upon the faith of the due fulfilment of that engagement or promise; and it cannot make any difference, in relation to the legal validity of that engagement or promise, whether the bailee has expressly promised to redeliver it to the bailor, or whether it is inferred from implication from the acts and intentions of the parties. In each case the consideration is precisely the same. What is the consideration? It is, on the part of the bailor, yielding up his present possession, custody, and care of the thing to the bailee, upon the faith of his engagement or promise to redeliver it. It is true that the bailee may derive no benefit from the deposit. But that is not the only source of legal considerations. A detriment or parting with a present right, or delaying the present use of a right, on

§ 20. The point which the decision in *Coggs v. Bernard* directly involves, viz., that if a man undertake to carry goods safely, he

the part of the promisee, is a sufficient consideration to support a contract by the promisor, although the promisor derives no benefit whatever from it." See note to p. 4, § 2, of 4th ed. of *Story on Bailm.* The authorities cited by the learned author, besides the opinion of Lord Holt, in *Coggs v. Bernard*, in support of the proposition that, where a gratuitous undertaking to deliver a thing at the request of the owner is entered upon, it becomes a valid and obligatory contract upon the bailee to perform the duty of redelivery, expressly or impliedly resulting from his engagement, are *Comyns's Dig. Act. on the Case, Assumpsit, B.*; *Williamson v. Clements*, 1 Taunt. 522; *Lengridge v. Dorville*, 5 B. & Ald. 117; *Wheatley v. Low*, Cro. Jac. 668; *Palmer*, 281. This last case was a mandate of money, not goods, and it was finally established that there was a sufficient consideration to support the action; and the judgment was affirmed in error. There are also referred to the more modern cases of *Whitehead v. Greeham*, 1 M'Clel. & Y. 205, 2 Bing. 264; *Doorman v. Jenkins*, 2 A. & E. 256; *Shillibeer v. Glyn*, 2 M. & W. 143. Sir James Mansfield, in *Mills v. Graham*, 4 Bos. & P. 140, 145, says: "A bailment of goods to be redelivered, imports an agreement to redeliver. All special bailments import a contract to redeliver, when the purpose for which the goods were deposited is answered. See also *Smedes v. Bank of Utica*, 20 Johns. 377, 3 Cow. 662; *Bank of Utica v. McKinster*, 11 Wend. 473; *Todd v. Figley*, 7 Watts, 542. The distinction between engaging to do an act gratuitously and then omitting to do it, and an unfaithful performance of the engagement after its execution is entered upon, or, in other words, the difference between nonfeasance

and misfeasance in gratuitous bailees, is as very learnedly discussed at the bar, and by Chief Justice Kent in *Thorne v. Deas*, 4 Johns. 84-102. Sir William Jones considers (*Essay on Bailm.*) that an action will bar the non-performance of a promise to become a mandatary, though the promise be merely gratuitous; but all the leading cases show that, by the common law, a person who undertakes to do an act for another, without reward, is not answerable for omitting to do the act; and that he is only responsible when he attempts to do it and does it amiss. In other words, he is responsible for a misfeasance, but not for nonfeasance, even though special damages are averred. "Those," says Kent, C. J., in *Thorne v. Deas*, *ub. sup.*, "who are conversant with the doctrine of *mandatum* in the civil law, and have perceived the equity which supports it, and the good faith which it enforces, may, perhaps, feel a portion of regret that Sir William Jones was not successful in his attempt to ingraft this doctrine, in all its extent, into the English law." The Supreme Court of North Carolina say, that a consideration of some sort is absolutely necessary to the validity of every contract, but that it need not be in money, nor money's worth. They expressly recognize as law the doctrine laid down in the case of *Coggs v. Bernard*; and they consider it as settled law, that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. Here the defendant undertook a duty for the plaintiff, — that of collecting or returning certain notes. If nothing more had taken place between the parties, the agreement would have been a *nudum pactum*, binding upon neither. But it did

is responsible for damage sustained by them in the carriage, through his neglect, though he was not a common carrier, and was to have nothing for the carriage, is now clear law, and forms a part of a general proposition in the law of principal and agent, which may be stated. It has been laid down in the following words, viz. : "The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." This is a proposition which includes cases stronger than that of *Coggs v. Bernard*, for there the defendant had undertaken to lay the goods down safely, and thus introduced a special term into his contract. From Lord Holt's judgment in this case it will be seen that, notwithstanding what was said by Lord Coke in *Southcote's* case, there is a difference between the effect of a gratuitous undertaking to keep or carry goods, and a gratuitous undertaking to keep or carry them safely. But under the rule just laid down, a gratuitous and voluntary agent, who has given no special undertaking, though the degree of his responsibility is greatly inferior to that of a hired agent, is yet bound not to be guilty of gross negligence.¹ It is, indeed, clear, from the

not; the plaintiff delivered to the defendant, and he took into his possession, the notes, for the purpose, and under the obligation, to collect or return them. By so doing, he entered upon his trust, and the law imposed the duty of performing it. *Robinson v. Threadgill*, 13 Ired. 39.

¹ See note to *Coggs v. Bernard*, by Smith, 1 Smith's Lead. Cas. 96. The decision in the case of *Southcote*, referred to in the text, has not been questioned, but the dictum of Lord Coke (see the case 4 Rep. 84; Cro. Eliz. 815), "that to keep and to keep safely are one and the same thing," Sir William Jones considers to be completely overthrown by Lord Holt, in *Coggs v. Bernard*. All the later authorities explode the doctrine that an undertaking to keep, and an undertaking to keep safely, amount to the same thing. Story on Bailm. § 72. *Southcote's* case, according to Lord Coke's own report, was as follows :

He brought detinue against the defendant, Bennet, for certain goods, and declared that he delivered them to the defendant to keep safe; the defendant confessed the delivery, and pleaded in bar that, after the delivery, one J. S. stole them feloniously out of his possession; the plaintiff replied, that the said J. S. was the defendant's servant, retained in his service, and demanded judgment; and, upon demurrer in law, judgment was given for the plaintiff. And the reason or the cause of the judgment was, because the plaintiff delivered the goods to be safely kept, and the defendant had taken it (the risk) upon him by the acceptance upon such delivery, and, therefore, he ought to keep them at his peril; although, in such a case, he should have nothing for his safe-keeping. This is the substance of the case (see Story on Bailm. § 69); and Lord Coke, in the sequel, proceeds to expound his own views of the general

decisions which will be offered, that a gratuitous bailee (as a carrier without hire) is chargeable for gross negligence, if not liable for other kinds of negligence.

§ 21. The rule as to responsibility for gross negligence in a depositary, it is evident from what has been offered, will apply to a mandatary, or a carrier without hire. The liability of both seems to be precisely the same, and both are bound to slight diligence, and to slight diligence only, and are liable for nothing short of gross negligence, the reason in each being the same, viz., that neither is to receive any reward for his services.¹ In *Doorman v. Jenkins*,² which was the case of a depositary, Mr. Justice Taunton says: "The counsel properly admitted that as this bailment was for the benefit of the bailor, and no remuneration was given to the bailee, the action could not be maintainable except in the case of gross negligence." In the case of *Foster v. Essex Bank*,³ the court say, that in case of a deposit to be kept without reward, "the bailee will be answerable only for gross negligence, which is considered as equivalent to a breach of faith." Where a promissory note was delivered to a bailee, on the voluntary undertaking, without reward, to secure and take care of it, it was held, that he was not bound to take any active measures to obtain security, but was simply bound to keep the note carefully and securely, and receive the money; and that the owner could not recover of him for the loss thereof, without proof of gross

doctrine with that superabundance of learning for which he was so remarkable. Sir William Jones, in commenting upon this case (disclaiming any intention to speak in derogation of the great commentator of Littleton), says, "It must be allowed, that his profuse learning often ran wild, and that he has injured many a good cause by the vanity of thinking to improve them." Jones on Bailm. 42. See *Kirkland v. Montgomery*, 1 Swan, 452; *Fay v. Steamer New World*, 1 Calif. 348; and *Litchfield v. White*, 3 Sandf. 545.

¹ "The contract of mandate is so nearly allied to that of deposit, that it may properly be deemed to belong to the same class." Story on Bailm.

§ 140; see also *Ibid.* § 150. That all unpaid agents are bound not to be guilty of gross negligence, see note by Mr. Smith to the case of *Coggs v. Bernard*, 1 Smith's Lead. Cas. p. 219 of the Am. ed. 1847, and the note of Mr. Wallace, the American editor, *Ibid.* p. 241; *Shiells v. Blackburne*, 1 H. Bl. 158; *McDonough v. Robinson*, 26 Vt. 316; *Langley v. Brown*, 1 Moore & P. 583; *Knowles v. Atlantic R.* 38 Maine, 55.

² *Doorman v. Jenkins*, 2 A. & E. 256.

³ *Foster v. Essex Bank*, 17 Mass. 479. On a bailment to keep, without an interest, the bailee is liable only for gross negligence. *Chase v. Maberry*, 3 Harring. Del. 266.

negligence or fraud.¹ (a) Accordingly, whenever the extent of a mandatary's liability is discussed, it is common to find cases respecting that of depositaries cited and relied on, and so *vice versa*.

§ 22. Gross negligence has already been defined,² and it appears from the definition which has been given, that it means nothing more than, in the words of Mr. Justice Taunton, "a great and aggravated degree of negligence as distinguished from negligence of a lower degree."³ Therefore, as the learned judge in the case referred to says, there may be cases where the question of gross negligence is matter of law more than of fact, and others where it is matter of fact more than of law. All the cases afford illustration of the difficulty of defining gross negligence with satisfactory precision; but the case of *Tracy v. Wood*⁴ is considered very striking, in respect of the nice and difficult line of distinction between what is and what is not gross negligence, under the circumstances.⁵ The explanations to the jury by the learned judge in that case are, that gross negligence is the want of that care which unpaid bailees, of ordinary prudence, usually take of bailed property; again, the want of that care which men of common sense, however inattentive, usually take of their own property; again, the care which men ought to be presumed to take of their own property; again, the reasonable care which unpaid bailees usually take of bailed property; and, again, that reasonable care which he himself usually took of bailed property. It has been ably argued that the common-law principle set out in the nature of the action, that any negligent conduct which causes injury or loss, or which satisfies the jury that there has been fraud and collusion, explains itself more clearly than those various definitions explain it. The expressions, as is said, convey so indefinite a meaning that we find Lord Holt saying, that a hirer and borrower are both liable for slight negligence; and Sir William Jones and Mr. Justice Story maintaining, that a borrower is liable for slight negligence, and a

¹ *Whitney v. Lee*, 8 Met. 91.

⁴ *Tracy v. Wood*, 3 Mason, 132.

² See *ante*, § 10.

⁵ See note (a) to p. 572 of Kent's

³ *Doorman v. Jenkins*, 2 A. & E. Com.; and *Foster v. Essex Bank*, 261. *ub. sup.*

(a) See *Chouteau v. Steamboat St. Anthony*, 20 Misso. 519.

hirer only for gross negligence. There is no test to which these difficulties are to be submitted but the form of the pleadings. The action against both is the same, and charges negligent conduct, occasioning injury or loss: from which it appears that the older judge is right in saying, that the same degree of negligence will make both liable (with which Blackstone agrees); and also in saying, that slight negligence or any negligence, if it be the legal cause of injury or loss, will make them liable.¹

§ 23. May it not be fairly collected from the opinions of the most learned judges that, as a settled principle of the common law, any palpable negligence in a gratuitous bailee is culpable negligence; and that if a loss, in consequence, happens to the bailor, the former is liable?² According to Lord Chief Justice Holt, in *Coggs v. Bernard*,³ the trust is a sufficient consideration to create the obligation of careful management. Lord Ellenborough, in his address to the jury in *Nelson v. Mackintosh*,⁴ says that every person who delivers goods to another, to be carried for hire, has a right to the utmost care, and where a person does not carry for hire he is bound to take proper and prudent care of that

¹ Note of Mr. Wallace to *Coggs v. Bernard*, commencing on p. 242 of 1 Smith's Lead. Cas. (Am. ed. 1847). In the note referred to, Mr. Wallace also says: "We find it frequently laid down that an unpaid bailee is liable only for gross negligence. This, it will be observed, is not a legal term; the declaration charging only fraud, or careless and negligent conduct, producing damage: it is an expression used by judges and text-writers to explain what is meant by the legal terms used in the declaration. If actual fraud and malignity of design is the point of the case, then gross negligence must mean such wanton carelessness as satisfies the jury of such corrupt design; but if—as is more frequently the case—actual fraud in fact cannot be inferred, then negligence must be considered gross or not, according to the degree in which it is the cause of the injury. Nearly all the confusion and uncertainty which belong to the subject of bail-

ments have been occasioned by the unfortunate introduction of the words 'gross' and 'slight' negligence, which do not belong to our law, and which convey no precise idea. The civil law distribution and classification of those liabilities is entirely different from ours; our law has conceived of the legal obligations and duties of men in relation to their neighbor's property, and has, by this action on the case, defined them with so much comprehensiveness and precision that the same principle applies irrespectively of the seat of the possession."

² See opinions of Holroyd, J., in *Garnet v. Willan*, 5 B. & Ald. 53; of Dallas, C. J., in *Duff v. Budd*, 3 Brod. & B. 177; of Best, J., in *Batson v. Donovan*, 4 B. & Ald. 32; *Glover v. North Staffordshire R.* 16 Q. B. 912, 5 Eng. L. & Eq. 335.

³ 2 Ld. Raym. 209.

⁴ *Nelson v. Mackintosh*, 1 Stark. 237.

which is committed to him; and if he ascertains that the article is of great value, he is bound to watch with great care and diligence. Lord Chief Justice Denman said, in delivering the opinion of the court in *Hinton v Dibbin*:¹ "When we find 'gross negligence' made the criterion to determine the liability of a carrier [he is speaking of a common carrier] who has given the usual notice, it might, perhaps, have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted whether, between gross negligence and negligence merely, any intelligible distinction exists." In *Wyld v. Pickford*, in the English Exchequer Chamber,² Parke, B., affirms that in some of the cases the term "gross negligence" has been defined in such a way as to mean "ordinary negligence," or the want of such care as a prudent man would take of his own property; and again, a common carrier, limiting his responsibility by notice, is not made irresponsible for any mistake or inadvertence, "but only for such as were made without negligence, whether gross or ordinary; and a delivery may be even grossly negligent which is inadvertent."³ In a still more recent case, in the same court, Rolfe, B., remarks: "I said I could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet."⁴ In a case in the Supreme Court of the United States, Mr. Justice Curtis, in giving the opinion of the court, remarked: "The theory that there are three degrees of negligence, described by the terms 'slight,' 'ordinary,' and 'gross,' has been introduced into the common law from some of the commentators on the Roman law. It may be doubted," he adds, "if these terms can be usefully applied in

¹ *Hinton v. Dibbin*, 2 Q. B. 646. Cresswell, J., in *Austin v. Manchester* R. 10 C. B. 454, 11 Eng. L. & Eq. 512, in giving the opinion of the court, says: "The term 'gross negligence,' is found in many of the cases reported on this subject, and it is manifest that no uniform meaning has been ascribed to those words;" and he refers to the opinion of Lord Denman, in *Hinton v. Dibbin*, *ub. sup.* See *Armistead v. Wilde*, 17 Q. B. 261.

² *Wyld v. Pickford*, 8 M. & W. 460.

³ *Ibid.* 462.

⁴ *Wilson v. Brett*, 11 M. & W. 113. See *Steamboat New World v. King*, 16 How. 474; *Litchfield v. White*, 3 Sandf. 545; and examine the authorities cited *ante* to § 4 and § 20; *Deevort v. Loomer*, 21 Conn. 245; *Brand v. Troy R.* 8 Barb. 368; *Baltimore R. v. Woodruff*, 4 Md. 257.

practice." (a) Shaw, C. J., in delivering the opinion in a case involving a question of insurance, says: "The terms 'slight negligence,' 'want of ordinary,' and 'gross negligence,' are useful in their way; but they are not precise and exact enough, without a statement of the facts designated by them, to enable a court to judge of the rights of the parties thereby affected. The proper business of jurisprudence seems to be to take a series of facts and circumstances, conceded or proved, and to declare what are the rights of the parties arising out of them."¹

§ 24. If the subject-matter of the bailment consists of living animals, such as oxen, horses, or sheep, the degree of care to be exercised by a mandatary must be consistent with the character of the trust and the nature of the property, agreeably to the doctrine as above stated by Lord Ellenborough. The mandatary, therefore, in such case, is bound to give the animals a proper and reasonable amount of exercise and fresh air, and to furnish them with suitable food and nourishment, and generally to provide them with all such things as are essential to the preservation of their health; and his neglect so to do will amount to a positive breach of trust.² Taking charge of cattle or sheep, and afterwards taking no heed of them, but allowing them to stray away on a common, and get drowned or lost, this is a breach of trust, and the mandatary is responsible for the loss.³ If a man turns a horse, of which he has consented gratuitously to take charge, into a dangerous pasture after dark, and the horse falls into a pit or a well, or into the shaft of a mine, this is gross negligence and breach of trust, and he shall be responsible for the loss.⁴ One driving a

¹ Carter v. Holbrook, 3 Cush. 331. See *ante*, § 6.

² Si un cheval soit bail a un homme a garder et apres il ne lui donc sustenance, p. q. il morust action sur le cas gist. Hil. Term, 2 Hen. 7, 9, B., cited in Add. on Contr. 847.

³ Hil. Term, 2 Hen. 7; 2 Hen. 7, 9, B. *ub. sup.* Coggs v. Bernard, 2 Ld. Raym. 909. See *post*, §§ 34, 52.

⁴ Rooth v. Wilson, 1 B. & Ald. 61.

If a man places a horse, of which he has consented gratuitously to take charge, in a pasture surrounded by rotten and very defective fences, and the horse, by reason thereof, strays away and is lost, this is a breach of trust, for which he shall be answerable; but if the horse was a wild and ungovernable animal, and got away through his own recklessness and impatience of restraint, as much as by

(a) See *Steamboat New World v. King*, 16 How. 474; *Holladay v. Kennard*, 12 Wall. 254; *Railroad Co. v. Lockwood*, 17 Wall. 357, 382; *Wells v. New York R.* 24 N. Y. 181; *Perkins v. New York R.* 24 N. Y. 196.

sulky, for amusement, and at the request of the owner, is liable if he do not use common prudence, and by carelessness and negligence break the sulky.¹

§ 25. The true way of putting cases, where the subject-matter of a bailment is a perishable commodity, is to consider whether the party has omitted that care which bailees, without reward, are usually understood to take of property of the like nature.² If the mandatary of a valuable painting, for example, takes no heed for its preservation, but lets it lie on the damp ground, or places it in a kitchen, or against a damp wall in a room where there is no fire, when he might have placed it in a dry situation and in perfect security, this is an act of gross negligence; and if the picture is seriously injured or totally destroyed from damp or dirt, he must make good the loss, unless he can show that the mandator knew where it was placed, and assented to its being there kept.³

§ 26. A gratuitous bailee ought undoubtedly, therefore, to proportion his care to the injury or loss which is likely to be sustained by any want of proper care on his part.⁴ This is so obvious, that it scarcely requires to be insisted on that the degree of care which a mandatary may be required to exert must be materially affected by the value of the property, and its consequent liability to be stolen. The care which would be proper as to goods of small value, and of a nature not to hold out strong temptation to theft, would not be proper for goods of great value, which do hold out such temptation.⁵ Lord Stowell, in the case of *The Rendsberg*,⁶ has put a case in point. "If," said he, "I send a servant with money to a banker, and he carries it with proper care, he would not be answerable for the loss, though his pocket were picked on the way. But if, instead of carrying it in a proper manner, and with ordinary caution, he should carry it openly in his hand, thereby exposing valuable property, so as to invite the snatch of any person he might meet in the crowded population of the town, he would be liable; because he would be guilty of the *negligentia malitiosa*, in doing that from which the law must

reason of the defective fences, the bailee will not be responsible. *Domat*, Depot, s. 3, 6.

¹ *Carpenter v. Branch*, 13 Vt. 161.

² *Story on Bailm.* § 67.

³ *Mytton v. Cock*, 2 Stra. 1099.

⁴ See *Story on Bailm.* §§ 15, 186.

⁵ *Nelson v. Mackintosh*, 1 Stark. 237.

⁶ 6 Rob. Adm. 142, 155. And see *ante*, § 8.

infer that he intended the event which has actually taken place."

§ 27. What is, and what is not, gross negligence, or negligence in a gratuitous bailee, amounting to a breach of faith, is, as has already been stated, often a mixed question of law and fact,¹ but it is more generally a pure question of fact, to be determined by a jury.² It must be judged of, in endeavoring to apply the spirit of the law, by the actual state of society, the general usages of life, and the dangers peculiar to the times, as well as by the apparent nature and value of the subject-matter of the bailment, and the degree of care it seems to demand.³ In *Beauchamp v. Powley*,⁴ where the defendant, a stage-coachman, received a parcel to carry gratis, and it was lost upon the road, Lord Tenterden directed the jury to consider whether there was great negligence on the part of the defendant, and the jury, thinking there was, found a verdict against him. The plaintiff, in *Storer v. Gowen*,⁵ claimed to recover a sum of money, alleged to have been inclosed in a letter, and delivered by him to the defendant, to be carried to a certain town, and left with a certain person for another person, but by the defendant converted to his own use. There was no evidence that the defendant received, or was to receive, pay for carrying the letter, or the contrary. It was the province of the jury, the court held, and not of the court, to decide the question, whether gross negligence was, or was not, proved; and the exceptions which had been filed against the verdict, which was for the plaintiff, were sustained. In *Tracy v. Wood*,⁶ which was the case of a mandatary of money, the learned judge said, if the jury were of opinion that the defendant omitted to take that reasonable care

¹ *Ante*, § 22. *Doorman v. Jenkins*, 2 A. & E. 261, per Taunton, J.

² *Vaughn v. Menlove*, 3 Bing. N. C. 468. *Beardslee v. Richardson*, 11 Wend. 25. *Storer v. Gowen*, 18 Maine, 174. How much care, the court in this case said, will in a given case relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances, which could not exactly be defined. See also *Nelson v. Mack-*

intosh, 1 Stark. 237; *Moore v. Moor-gue*, 1 Cowp. 479; *Beatty v. Gilmore*, 16 Penn. State, 463; *Dawson v. Chauncey*, 5 Q. B. 164.

³ See *ante*, §§ 7, 8, 11, 16. Story on Bailm. § 11. *Tompkins v. Salt-marsh*, 14 S. & R. 275. *Storer v. Gowen*, *ub. sup.* *Tracy v. Wood*, 3 Mason, 132.

⁴ *Beauchamp v. Powley*, 1 Moody & R. 38.

⁵ *Storer v. Gowen*, 18 Maine, 174.

⁶ *Tracy v. Wood*, 3 Mason, 132.

of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under the circumstances, he had been guilty of gross negligence.

§ 28. As a general rule, as has been shown, a gratuitous bailee would be excused for a loss occasioned by theft or robbery; (a) but yet, if the circumstances attending a loss alleged to have been so occasioned are of a suspicious character, tending to throw a doubt upon the good faith of the mandatary, a jury will naturally disbelieve the theft or robbery, and treat the loss as unaccounted for and unexplained.¹ The captain of a vessel was intrusted with a seaman's chest, to be carried gratuitously from Trinidad to England, and, during the voyage, the chest was opened to see if it contained any contraband articles, and was found to be filled with money and valuables, which were taken out by order of the captain, put into a canvas bag, and deposited in the captain's own chest in his cabin, where his own money and valuables were kept. On the arrival of the vessel at Gravesend, the captain and one of the mates went ashore, leaving the vessel in charge of the other mate, and the next morning the captain's chest was missing, and was never afterwards discovered. It further appeared that, the night preceding the loss, an excise officer and two young men belonging to the ship had been allowed to sleep in the captain's cabin; and Lord Ellenborough left it to the jury to say whether the captain had been guilty of negligence, telling them that, as soon as he had discovered the valuable nature of the property, he was bound to watch it with great care and diligence; and the jury, being of opinion that proper care had not been taken of the money, found a verdict for the plaintiff for the full value of the property.²

§ 29. In cases, therefore, of losses alleged to have been committed by theft or robbery, the circumstances, and the acts and declarations of the mandatary immediately preceding and directly following the stealth, are of importance; direct proof being difficult, and not to be expected. The circumstances and conduct of the mandatary it is the duty of the jury to weigh with the utmost circumspection; and the presumption arising there-

¹ *Ante*, § 11.

² *Nelson v. Mackintosh*, 1 Stark. 237.

(a) *Fay v. Steamer New World*, 1 Calif. 348.

from is more or less strong, as they might appear to be natural and consistent, or otherwise.¹ Evidence is constantly adapting itself to the state of society and the concerns of the world, and therefore must accommodate itself to the altered mode of travelling, by stage-coaches, railroads, and steamboats, instead of (as in more early times) on horseback or in private carriages. Carriers are constantly more exposed to secret stealth in a crowded stage, railroad car, or a steamboat, crowded with passengers, where the traveller cannot keep his eye upon his own baggage, than by private conveyance. Public houses of entertainment in our large cities are generally filled with strangers, and without great circumspection the traveller cannot avoid exposure to great risks. Hence a traveller, acting as a gratuitous carrier of the property of another, should not, it has been held, be precluded from showing how he conducted himself, and the degree of care he took of the property in his custody.²

§ 30. In *Tompkins v. Saltmarsh*,³ S. delivered to T. at Georgetown, in the District of Columbia, five bank-bills, of five dollars each, to be conveyed to Athens, Bradford County, Pennsylvania, there to be delivered to S. The court held, in the first place, that T. was not bound to lay aside all other business to take the direct road from Georgetown to Athens; and that it was competent for him to show that, immediately on the receipt of the bills, he proceeded to Philadelphia, to New York, and to Athens, and to show how he conducted himself, and what care he took of the property, and that his care was the usual ordinary care. The court was also of opinion that, in excuse for the loss of the money which had been stolen, it was proper that evidence should be received of the hue and cry raised immediately after the discovery of the loss, and the assiduous and indefatigable exertions of the carrier in searching for the money; and though it was said that this would have been the course of a guilty man, yet it was one which an innocent man would naturally take, and which, if he did not take, all would condemn him. The next best evidence of the proof of a thing itself was the proof of those circumstances which would naturally attend it; and these were the

¹ *Tracy v. Wood*, 3 Mason, 132.
Graves v. Ticknor, 6 N. H. 537.

² *Tompkins v. Saltmarsh*, 14 S. & R. 275.

³ *Ub. sup.*

production of the cut valise, the immediate promulgation of the theft, and pursuit of the property.

§ 31. In *Tracy v. Wood*,¹ the case was: A undertook gratuitously to carry two parcels of doubloons for B from New York to Boston, in a steamboat, by the way of Providence. A, in the evening (the boat being to sail early in the morning), put both bags of doubloons, one being within the other, into his valise, with money of his own, and carried it on board the steamboat, and put it into a berth in an open cabin, although notice was given to him by the steward that they would be safer in the bar-room of the boat. A went away in the evening, and returned late, and slept in another cabin, leaving his valise where he had put it. The next morning, just as the boat was leaving the wharf, he discovered on opening his valise that one bag was gone, and he gave an immediate alarm, and ran up from the cabin, leaving the valise open there, with the remaining bag, his intention being to stop the boat. He was absent for a minute or two only, and on his return the other bag also was missing. An action being brought against him by the bailor for the loss of both bags, the question was left to the jury whether there was not gross negligence, although the bailee's own money was in the same valise. The jury was directed to consider whether the party used such diligence as a gratuitous bailee ought to use under such circumstances. They found a verdict for the plaintiff for the first bag lost, and for the bailee for the second.

§ 32. Although, *primâ facie*, in cases of the gratuitous carriage of goods for another, the bailee, when he keeps them with the same care as he keeps his own of the same description, would repel the imputation of negligence, yet by the above case of *Tracy v. Wood* it appears that the presumption may be overcome by proofs of actual negligence, or of conduct which, though applied to his own goods as well as to those bailed, would be deemed negligence in bailees, without hire, of ordinary prudence.²

¹ *Tracy v. Wood*, 3 Mason, 132.

² Story on Bailm. §§ 183, 185. Sir William Jones has put a case illustrating the former position in the text: "If Stephen desire Philip to carry a diamond ring from Bristol to a person in London, and he put it with bank-

notes of his own into a letter-case, out of which it is stolen at an inn, or seized by a robber on the road, Philip shall not be answerable for it, although a very careful or perhaps a commonly prudent man would have kept it in his purse at the inn, and have con-

§ 33. It is undoubtedly true, as has been expressly held in North Carolina, that a bailee who undertakes gratuitously to carry money is bound to use care and caution; and that if he loses the money intrusted to him, but does not lose his own, it is very strong evidence that he did not use becoming caution.¹ But it is quite clear that gross negligence may be committed by a depositary or a mandatary, although he may have kept the property intrusted to him with as much care as his own; and this doctrine has been sanctioned by cases other than that of *Tracy v.*

ceased it somewhere in the carriage. But if he were to secrete his own notes with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaise, he would be bound, in case of a loss by stealth or robbery, to restore the value of it to Stephen." Jones on Bailm. 62. The other position may be illustrated by the case of *Tracy v. Wood*, Story on Bailm. § 185. And see 1 Browne, Civil Law, 383, note. In Story on Bailm. § 67, it is said that the true way of putting questions of this nature is, to consider whether the party has omitted that care which bailees without reward are usually understood to take of property of the like nature; and he refers to *Tracy v. Wood*, *ub. sup.*, and to the opinion of Lord Stowell, in the case of *The William*, 6 Rob. Adm. 316, which was a case of justifiable capture, where the captors are held responsible for due (that is, for reasonable) diligence. In that case Lord Stowell thus expressed himself: "On questions of this nature there is one position sometimes advanced which does not meet with my entire assent, namely, that captors are answerable only for such care as they would take of their own property. This, I think, is not a just criterion in such case; for a man may, with respect to his own property, encounter risks, from views of particular advantage, or from a natural disposition to rashness, which would be en-

tirely unjustifiable in respect to the custody of the goods of another person which have come to his hands by an act of force. Where property is confided to the care of a particular person, by one who is or may be supposed to be acquainted with his character, the care which he would take of his own property might, indeed, be considered as a reasonable criterion." "Certainly it might," says Story, "if such character was known, and the party, under the circumstances, might be presumed to rely, not on the rule of law, but on the care which the party was accustomed to take of his own property in making the deposit. But, unless he knew the habits of the bailee, or could be fairly presumed to trust to such care as the bailee might use about his own property of a like nature, there is no ground to say that he has waived his right to demand reasonable diligence." But in *Monteith v. Bissell*, Wright, 411, the judge said that a bailee of money, without reward, was not liable, if he kept the money where he kept his own.

¹ *Bland v. Womack*, 2 Murph. 373. See also *Stanton v. Bell*, 2 Hawks, 145. In *Anderson v. Foresman*, Wright, 598, the judge told the jury that one carrying money without reward is bound to take the same care of it that he does of his own. And see *Foster v. Essex Bank*, 17 Mass. 479.

Wood. The very point was presented in *Doorman v. Jenkins*.¹ This was an action of assumpsit, in which it was proved that the defendant, a coffee-house keeper, having custody of money without reward, lost it, and made the following statement: That he had unfortunately put it, with a larger sum of money of his own, into his cash-box, which was kept in his tap-room; that the tap-room had a bar in it, and was open on a Sunday, but the rest of his house, which was inhabited, was not open on Sunday; and that the cash-box, with his own and the plaintiff's money, had been stolen on that day. The judge left it to the jury whether the defendant was guilty of gross negligence, and told them that the loss of the defendant's own money did not necessarily prove reasonable care. The jury having found for the plaintiff, it was held, first, that the question of gross negligence was properly left to the jury; and, secondly, that there was evidence upon which they might find for the plaintiff.

§ 34. Again, where a gratuitous bailee put a horse of his brother into a pasture with his own cattle, in the night-time, and by reason of a defect of fences the horse fell into a neighboring field and was killed, it was thought that he was responsible to the owner, because it was gross negligence to put the horse into a dangerous pasture to which he was unused.²

§ 35. It has, nevertheless, been deduced as a corollary from the rule often laid down in the books, that a gratuitous bailee is bound to take the same care of the thing bailed as he takes of his own; that, if he commits a gross neglect in regard to his own goods as well as in regard to those bailed, by which both are lost, he is not liable.³ But, notwithstanding, says Story, the weight of the authorities referred to, they do not seem to express the general rule in its true meaning. The common law, upon the subject of gross negligence, differs from that which is supposed to be the doctrine of the civil law; for gross negligence, although it may be sometimes presumptive of fraud and undistinguishable

¹ *Doorman v. Jenkins*, 2 A. & E. 256.

² *Rooth v. Wilson*, 1 B. & Ald. 59.

³ Sir William Jones seems, in some places, so to understand the doctrine. Jones on Bailm. 31, 32, 46, 47. Bracton, also, so lays it down on the authority of the civil law. Bracton,

Lib. 3, cap. 2, § 1. Just. Inst. Lib. 3, tit. 15, § 3. Dig. Lib. 16, tit. 3, l. 20, 32. Lord Holt has also given the authority of his great name, *Coggs v. Bernard*; and he has been followed by Kent, 2 Kent, Com. 562, 563, and note (a); *Foster v. Essex Bank*, 17 Mass. 479. See Story on Bailm. § 53.

from it, yet may consist of perfect innocence of intention.¹ Hence it is no defence to a depositary that he has acted with good faith if in truth he has been guilty of gross negligence;² as appears by *Tracy v. Wood*, and the other cases above cited. In *McLean v. Rutherford*, in Missouri,³ it was affirmed by one of the judges that the bailee's property, sharing the fate of the bailor's, while it repels the presumption of fraud, will not, in all cases, excuse the bailee. A man might, in respect of his own property, be willing to encounter extraordinary risks, or adventure upon mere gambling speculations, with a view to a particular advantage, or from a natural disposition to rashness, which would be entirely unjustifiable in respect to the goods of another put in his custody.⁵

§ 36. A mandatary who undertakes an office of skill is bound to exercise such an amount of skill as he possesses, or such an amount of skill as, by his conduct and actions and ordinary course of employment, he holds himself out to the world to possess. An illustration of this principle is given by Mr. J. Heath: "If," says he, "a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action. The surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because his situation implies skill in surgery. But if the patient applies to a man of different employment or occupation for his gratuitous assistance, who either

¹ Story on Bailm. § 44.

² See *ante*, § 10, note.

³ Story on Bailm. § 66.

⁴ Per Napton, J., in *McLean v. Rutherford*, 8 Misso. 109.

⁵ Cases may, indeed, be put in which the circumstances of extreme rashness on the part of the depositor are so strong as justly to create an exception to the general rule of law, or, rather, a dispensation from it; as, if the depositor should knowingly intrust his diamonds or other valuables to a man notoriously weak and infirm in judgment, or to a minor without any experience or discretion, or to a man grossly negligent and prodigal in his own affairs, or subject to an absence of mind bordering on derangement, or to a person given to

habitual intoxication, and, from these known infirmities, the thing bailed should be innocently lost; in such case there might be strong ground to presume that the depositor was content to trust the party with all his faults and infirmities, and to take upon himself the responsibility for all losses not arising from actual fraud. At least, it might fairly be put to a jury to presume a special contract, in such a case, that the depositary should take the same care as he did of his own property, and no more, and he should not be responsible except for fraud. But these cases do not impugn the general rule. Story on Bailm. § 66. *The William*, *ub. sup.* *McLean v. Rutherford*, *ub. sup.*

does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable.”¹ So, a person who rides a horse gratuitously, at the owner’s request, for the purpose of showing him for sale, is bound, in doing so, to use such skill as he actually possesses; and if proved to be a person conversant with and skilled in horses, he is equally liable with a borrower from an injury done to the horse while ridden by him.²

§ 37. How far a bailee without hire may add to his responsibility by inserting special terms in his promise to his bailor is asserted to be a point not by any means clearly settled by the common law.³ The rule of the civil law, as applied to a depositary, and which is considered a rule of universal justice,⁴ is that the law depends on the contract: *Si convenit, ut in deposito et culpa præstetur, rata est conventio; contractus enim legem ex conventionem accipiunt.*⁵ Or, as it is otherwise expressed: *Si quid nominatim convenit, vel plus, vel minus, in singulis contractibus, hoc servabitur, quod initio convenit. Legem enim contractus debet.*⁶ So, by the civil law, the general responsibility of a mandatary may be varied by the special contract of the parties, either enlarging or qualifying, or limiting it (except for the protection of himself against fraud);⁷ and the particular contract will furnish the rule of the case: *Placuit, posse rem hac conditione deponi, mandatumque suscipi ut res periculo ejus sit, qui depositum vel mandatum suscepit.*⁸ Story considers that there is no principle of the common law which would prevent a depositary from contracting not to be liable for any degree of negligence, in which fraud is really absent; and that the maxim of our jurisprudence, *modus et conventio vincunt legem*, applies to all contracts not offensive to sound morals, or to positive prohibitions by the legislature. If

¹ Shiells v. Blackburne, 1 H. Bl. 162.

² Wilson v. Brett, 11 M. & W. 113.

³ By Mr. Smith in his note to Cogg v. Bernard, 1 Smith’s Lead. Cas. 222, Am. ed. 1847. But he refers to Kettle v. Bromsall, Willes, 118; to the observations of Sir William Jones, in Southcote’s case (4 Co. R. 83 b); and to the observations of Powell, J., in Cogg v. Bernard.

⁴ See Story on Bailm. § 81.

⁵ Dig. Lib. 16. tit. 3, 1, § 6. Pothier, Traité de Depot, n. 30.

⁶ Dig. Lib. 50, tit. 17, 1, 23. Jones on Bailm. 47, 48.

⁷ See Story on Bailm. § 32. By the civil law, *illud nulla pactione effici potest, ne dolus præstetur.* Pothier, Contrat de Mandat, n. 50.

⁸ Dig. Lib. 17, tit. 1. Pothier, Contrat de Mandat, n. 50. And see Story on Bailm. § 182 a.

a depositary, says this learned writer, should specially contract to keep the deposit safely, he might be liable for ordinary negligence, although the law would otherwise hold him liable only for gross negligence. Upon this ground proceeds the learned writer to say, Southcote's case may, perhaps, be maintained to be good law, and not to be liable to the objection made against it in *Coggs v. Bernard*.¹ If, indeed, it proceeded upon the ground mentioned by Lord Coke, that a bailment upon a contract to keep, and to keep safely, is the same thing, it certainly is not law, and was overruled in *Coggs v. Bernard*.² But from the report it would seem that the bailment was there to keep safe; and if so, then upon that special contract the party might have been held responsible, although he would not otherwise have been liable by the general law. This was the doctrine maintained by all the judges in *Coggs v. Bernard*, which case proceeded mainly upon this ground.³ In a later case, the same distinction was adopted by the court,⁴ in which it was held, that if a depositary should accept to keep safely, he would be responsible for losses by theft or robbery, although he would not otherwise be responsible upon the general principles of law.⁵ In a case in Missouri, it has been held that where the special promise was to drive the horses of another to a distant market, and sell them as he would his own, and the bailee is taken ill by the way, and so unable to take charge and dispose of them in person, he may employ an agent for such purpose, without incurring any other liability than that for gross negligence; and that under such contract he is not bound to dispose of the horses as a prudent man would dispose of his own.⁶

§ 38. As to the party upon whom the burden of proof lies, in an action by the bailor against a gratuitous bailee for gross negligence, a regard must be had to the form of the action. Where a *prima facie* case of trover is made out at the trial, the rule is different from what it would be in an action of assumpsit or an action on the case founded on negligence. In the latter actions the plaintiff must make out his case, *prima facie* as he charges it;

¹ Southcote's case, 4 Co. R. 83 b.

² See *ante*, § 20.

³ See Jones on Bailm. 42-45.

⁴ Kettle v. Bromsall, Willes, 118.

⁵ Story on Bailm. §§ 32, 33.

⁶ McLean v. Rutherford, 8 Misso. 109.

in the former, he may rely on an apparent conversion, or on a demand and refusal of the property, and thus put the other side on the defence. But the general principle of the common law is, that every man is presumed to do his duty, until the contrary is established; and on this account, in an action of assumpsit, or in an action on the case founded upon negligence, the burden of proof is on the plaintiff.¹ In *Graves v. Ticknor*,² it was held, that where a person, as a bailee without hire, received money in a letter to be delivered to another, and there was no evidence of the manner in which the package had been disposed of, the most favorable construction was to be given for the defendant. In *Beardslee v. Richardson*,³ it was held that where a mandatary had received a sealed letter with money in it, to carry from New Orleans to New York, the plaintiff was not entitled to recover without showing, either that the letter had been opened by the mandatary, or had been lost by his gross negligence, or that, on demand, he had refused to deliver it. If demanded, the mandatary would be bound to give some account of the loss, and to

¹ Story on Bailm. § 213. *Williams v. East India Co.* 3 East, 192. Mr. Wallace, in his very learned note to *Coggs v. Bernard* (1 Smith, Lead. Cas. 243, Am. ed. 1847), says, it may not be improper to note, that where money is the subject of bailment, assumpsit is the proper remedy; assumpsit in the form of money had and received usually being, in case of money, a substitute alike for trespass, trover, and case; though as a substitute for trover, there need be no previous demand. In trover, proof of demand and refusal throws upon the defendant the burden of proving that the property was lost or stolen. In case, the burden of proving negligence is on the plaintiff. Where the goods have not been returned or delivered, by the defendant, the most convenient way for the plaintiff to proceed appears to be, first, to make a demand, and then to bring trover and case; the demand and refusal will cause a recovery on the former count, unless the defendant prove a loss or theft; and then

upon the latter, the plaintiff will recover if he prove that negligence caused the loss; but the burden of this is upon him. In *Beekman v. Shouse*, 5 Rawle, 179, in assumpsit, against one liable as a paid agent, it is said, that the course of proof is similar; that the proof of contract and delivery puts the defendant to prove a loss, and then the plaintiff must show negligence. And see *Clark v. Spence*, 10 Watts, 335; and Story on Bailm. § 107. In *Dwight v. Brewster*, the first count in the declaration was in trover; the second charged the defendants as common carriers, and stating their undertaking to carry for the plaintiff a package for hire; the third alleged an undertaking on the part of the defendants to carry for a reward, and charged them with negligence in the transportation, whereby the package was lost. *Dwight v. Brewster*, 1 Pick. 50.

² *Graves v. Ticknor*, 6 N. H. 537.

³ *Beardslee v. Richardson*, 11 Wend. 25.

indemnify the plaintiff, unless he could show that the property was lost without gross negligence on his part.¹(a)

§ 39. If the ground of the action is for a negligent loss of money, an action for money had and received is not the proper form. The plaintiff employed the defendant, without reward, to carry £45 to a person at Liverpool. The defendant did not deliver it, and afterwards told the plaintiff that he had lost it in a brothel, but would repay it to him. There was no other evidence how the loss happened. In an action against the defendant for £45 had and received to his use, it was held, that the action lay independently of the promise, the defendant not having paid over the money, or returned it to the plaintiff; that if a loss in the manner alleged had been proved, the action would have been for gross negligence, and not for money had and received; but that the defendant's assertion was not satisfactory proof of his own gross negligence; and the case raised so much suspicion (said Littledale, J.), that the jury might infer a misapplication of the money. Chief Justice Denman said, that if the defendant was to avail himself of his own wrong to defeat an action which would otherwise lie, he must give clear proof of it; and that his own admissions were not such proof.²

§ 40. In an action of trover, if, when the goods were demanded, the mandatary should state, that the property was lost by accident, or stolen from him, and should narrate all the circumstances accompanying the loss; the question would then arise, whether they ought not to be deemed a part of the case, so as to entitle the mandatary to the benefit of the statement at the trial, as a part of the *res gestæ* at the time of the demand and refusal. Although he would be so entitled, still the jury would be at liberty to disbelieve the statement, or to find the mandatary guilty of gross negligence, if the circumstances did not, in their judgment, repel it.³ In *Tompkins v. Saltmarsh*, this doctrine

¹ In *Stewart v. Pratt*, 5 Ala. 114, it was held, that if the bailee, on being apprised of the loss of money intrusted to him, refuse to pay, or deny his responsibility, the jury would be authorized to infer a demand and refusal.

² *Parry v. Roberts*, 3 A. & E. 118.

³ See note to § 213 of Story on Bailm.; the case of *Doorman v. Jenkins*, 2 A. & E. 256, the facts in which case are stated *ante*, § 33. In *Storer v. Gowen*, 18 Maine, 174, which was an action of assumpsit, to recover a sum of money alleged to have been

was established in an action for negligence in the performance of a gratuitous undertaking to carry and deliver a certain number of bank-bills; the court holding, that the circumstances which would naturally attend the whole transaction, and the concomitant declarations of a man placed in the situation in which the defendant stood, in such a case, were of necessity proper evidence. Even in criminal proceedings, the court said, the declarations of prisoners have been received, as in an indictment for larceny, to explain their conduct; and the jury hear the evidence, and then judge for themselves, whether such declarations were genuine claims of property, though mistaken, or made to color a stealing. However good it may be, therefore, as a general rule, that nothing that a man does or says can be given in evidence to support his own cause, it has, like other general rules and positions, exceptions; if it had not, it would be better to have no general rules. Duncan, J., who delivered the opinion of the court in this case, concludes as follows: "I know not how even a careful and attentive man could escape, if evidence, such as the plaintiff gave, of the bare delivery of the package, was to charge him with the amount admitted to be lost; if he, without benefit or reward, having undertaken to do a favor for his friend, could not be discharged for the casualty, without direct evidence how it arose, by some eye-witness. No prudent man ever would carry a letter on these terms. There is in all these cases, I admit, a difficulty, — suspicion will attach, — the most upright man will feel mortification; but it is inconsistent with the state in which the law has placed the voluntary depositary, who acts for the benefit of another, to cast upon him the burden of showing exactly, by witnesses, the *quo modo* he lost it, when the bailor admits, that somehow he did lose it. The facts and circumstances are all for the consideration of the jury. To keep them from them, is excluding the only light which can be shed on the conduct of the party charged with negligence alone."¹

§ 41. In general, a mandatary can be said to have a special

enclosed in a letter, and delivered to the defendant to be carried; the court held, that the admissions of a party are evidence to the jury equally as well what makes in his favor as

against him. See also *Graves v. Ticknor*, 6 N. H. 537.

¹ *Tompkins v. Saltmarsh*, 14 S. & R. 275. And see the same doctrine applied to pawnees in *Story on Bailm.* § 339.

property in the thing bailed only when he has incurred expenses about it, and, consequently, has a lien. But, even when he has no special property, he may have an action for and tort done to the thing while in his possession; for it is a general principle of the common law, that possession, with and assertion of right, and, in many cases, possession alone, is a sufficient title for the maintenance of an action against a mere wrong-doer; and, therefore, if a mandatary deliver goods to another person, and they receive an injury for which the mandatary would be liable over to the owner, he may recover for his own indemnity.¹ This principle, however, seems in *Miles v. Cottle* to have been deemed inapplicable to the case of a mandatary who had disobeyed the direction under which a parcel had been intrusted to him, and thereby had made himself personally responsible to the owner: first, because (it was said) he had no special property in the parcel which had been delivered to him for a purpose not fulfilled by him; and secondly, because he had deprived the defendants of the intended hire for the carriage of the parcel.²

§ 42. As to the obligations of the mandator arising from the contract of mandate, the common law has, as yet, furnished no decisions which go to the point; but the doctrines of the Roman law on the point are not unworthy attention, and have accordingly received the attention of the learned author of the "*Commentaries on the Law of Bailments*," and who states the Roman law to be: First, if the bailor contemplates any thing to be done on his goods, by which the mandatary may or must incur expenses, he is bound to reimburse him; for it can never be presumed, that a gratuitous trust is designed to be a burden to the mandatary. Secondly, as to indemnity for incidental contract made by the mandatary. This is obviously founded on the same general principles of justice, and the presumed intention of the par-

¹ Story on Bailm. §§ 150, 152, § 93 *f.* As to a lien, *post*, § 43.

² *Miles v. Cottle*, 1 Lloyd & W. 353; 6 Bing. 743. The plaintiff, in this case, had received a parcel from A, to book for London, at the office of the defendant. Instead of doing so, the plaintiff, being about to go to London in the defendant's coach, put the parcel in his own bag, containing

his clothes, which was lost on the journey. The plaintiff had a verdict for the value of his own clothes. But the court held, that he was not entitled to any thing for the loss of the parcel intrusted to him, because, at the time, he had no absolute special property in the parcel, as the bailment had terminated by his own misfeasance.

ties, as the reimbursement of expenses. Thirdly, another question is, how far the mandator is bound to indemnify the mandatary for any losses or injuries sustained by him in the execution of the trust. The general rule of the civil law seems to be, that the mandator is bound to indemnify the mandatary against all losses and injuries, the proximate cause of which can be directly traced to the execution of the mandate; but not for losses and injuries of which the mandate was merely the occasion.¹ How far, says the learned author above referred to, any of these doctrines are or would be adopted in our law, cannot be satisfactorily answered by adjudged cases, for none can be found. But it is laid down by another late writer, that in the common law, if the mandatary must necessarily incur expense in the execution of the commission intrusted to him, he is clothed with an implied authority from the mandator to defray such expenses; and all money necessarily laid out by him in that behalf is money expended for the use of the mandator at his (implied) request; for the recovery whereof the ordinary action for money paid is maintainable by the mandatary. Thus, if a party requests a friend² to carry goods for him in a stage-coach to another town, for which goods carriage hire is usually paid, a like duty to pay the bill is presumed.³

§ 43. The French law accords to the mandatary a right to detain the chattel until he has received payment of the expenses he has incurred in the execution of the trust concerning it.⁴ In the common law no such right exists, and no lien is permitted to be claimed by one man upon the property of another for the expenses attendant upon the execution of a gratuitous commission.⁵

§ 44. In conclusion of the present chapter, it may be proper to notice the several reasons which have been assigned why actions at common law on the contract of mandate have been uncommon. The reason given by Sir William Jones is, that it is very uncommon for a person to undertake any office of trouble

¹ Story on Bailm. §§ 197-200.

⁵ Add. on Contr. 850. Sanderson

² The case put by Story on Bailm. § 197.

v. Bell, 2 Crompt. & M. 304. And see Chapman *v.* Allen, Cro. Car. 271;

³ Addison on Contracts, p. 849.

Jackson *v.* Cummins, 5 M. & W. 342;

⁴ Domat, Lib. 16, tit. 3; Lib. 1, tit. 15. Pothier, Contrat de Mandat.

Judson *v.* Etheridge, 1 Crompt. & M. 746.

without compensation.¹ “But, perhaps,” says Story, “a large survey of human life might have furnished a more charitable interpretation of this absence of litigation: first, because, from the great facilities of a wide and cheap intercourse in modern times, there is the less reason to burden friends with the execution of such trusts; and secondly, because, in cases of loss, there is an extreme reluctance, on the part of bailors, to make their friends the victims of a meritorious, although, it may be, a negligent kindness.”²

CHAPTER III.

OF CARRIERS FOR HIRE, WHO ARE NOT COMMON CARRIERS.

§ 45. It is proposed to consider next the liability of carriers for a reward, who are not common carriers. The liability of the mandatary, or carrier without reward, it appears by the preceding chapter, is derived from his undertaking, which, being gratuitous, excuses him in the absence of that aggravated degree of negligence, which the writers denominate gross negligence; but when the liability of a carrier arises from his reward, and he is not a common carrier, he is bound to ordinary diligence, and is responsible for ordinary neglect, which is the fixed mode or standard of diligence and of neglect.³ The latter sort of bailment, it has appeared, is called *Locatum*, or hiring, which is always for reward, and is that branch of it denominated *Locatio operis mercium vehendarum*;⁴ and the trust being reciprocally beneficial to the bailor and the bailee, the law exacts ordinary diligence on the part of the latter, and makes him responsible for ordinary neglect, and for that only.⁵ All depositaries for hire

¹ Jones on Bailm. 57.

² Story on Bailm. § 218.

³ See *ante*, §§ 9–11.

⁴ See the different sorts of bailments, *ante*, § 13.

⁵ See *ante*, §§ 11, 15. There is a marked difference in cases where ordinary diligence is required, and where

a party is only accountable for gross neglect. Ordinary neglect is the want of that diligence, which the generality of mankind use in their own concerns; and that diligence is necessarily required where the contract is reciprocally beneficial. Per Duncan, J., in *Tompkins v. Saltmarsh*, 14 S. & R.

(*Locatio custodiæ*),¹ such as warehousemen, wharfingers, &c., who are bailees upon a contract of mutual interest, stand upon the same footing as persons contracting for the carriage of goods for hire, who are not common carriers; and if they act with ordinary diligence and good faith, they are protected.²(a) The contract entered into by a booking-office keeper, who take parcels to be forwarded by carriers, is bound to ordinary diligence, and to

280. When goods are delivered to a carrier, the implied contract is to carry safely. *Raphael v. Pickford*, 2 Dowl. (N. S.) 916. A laundress sent linen, which she had washed, to the owner, by a carrier whom she paid; the carrier having lost it, it was held, that the laundress was entitled to sue the carrier for the loss. *Freeman v. Birch*, 3 Q. B. 483, 492.

¹ See *ante*, § 14; *Jones on Bailm.* 97.

² *Jones on Bailm.* 87. Story on Bailm. § 442 *et seq.* *Thomas v. Boston & Providence R.* 10 Met. 472. *Foote v. Storrs*, 2 Barb. 326. *McHenry v. Railroad*, 4 Harring. Del. 448. See further on this point, *post*, § 75.

(a) When the defendant is sued as a warehouseman, evidence is competent in defence to show that he exercised the same degree of care in relation to the property that was usually exercised in the vicinity in relation to such property by similar warehousemen. *Cass v. Boston & Lowell R.* 14 Allen, 448. As to what negligence will render a warehouseman liable, see *Lamb v. Western R.* 7 Allen, 98; *Barron v. Eldredge*, 100 Mass. 455; *Aldrich v. Boston & Worcester R.* 100 Mass. 31; *Parker v. Lombard*, 100 Mass. 405; *Lane v. Boston & Albany R.* 112 Mass. 455. In *Mitchell v. Lancashire R. L. R.* 10 Q. B. 256, the defendant company had brought goods consigned to the plaintiff, notified him of their arrival, and requested their removal, adding: "They remain here to your order, and are now held by the company, not as carriers, but warehousemen, at owner's sole risk, and subject to the usual warehouse charges, in addition to the charges now advised." Held, that the defendants, as warehousemen, were bound to take reasonable care of the goods. While goods are in the actual custody of a railroad company at the place of destination, although after the time when they ought to have been taken away, and where by the rules of the company the goods are to be unloaded by the consignee, yet, if the carrier proceeds to unload them, he is bound to use ordinary care and diligence to secure their being safely unloaded, and if damage occur through the want of such care, he is responsible. *Kimball v. Western R.* 6 Gray, 542. As to the effect of knowledge on the part of the owner of goods of the mode in which a warehouseman keeps them, see *Conway Bank v. American Express Co.* 8 Allen, 512; *Mitchell v. Lancashire R. L. R.* 10 Q. B. 256.

An express company is liable as a warehouseman for a loss where its agent locked money intrusted to it in its safe, and took such bad care of the key that a burglar had easy access to it. *American Express Co. v. Baldwin*, 26 Ill. 504.

that only, for their safe delivery.¹ A booking-office keeper, who also kept a wine-vault, was held liable for the omission of ordinary diligence for allowing goods to remain in front of the bar, exposed to persons coming in for liquor, even although they were of too large a size to be conveniently taken into the bar, behind the counter.² Want of ordinary care will render liable in Maine the owners of a boom for the loss of logs secured thereon.³

§ 46. The difference with respect to the degree of liability between a private carrier for hire and a common carrier (whose undertaking is always for hire) is, that the latter is bound to deliver the goods intrusted to him against all events but the acts of God and the public enemy. The responsibility which is founded merely upon the reward is not incurred when a certain degree of diligence has been used, whereas that which is imposed by the common law upon the common carrier is derived mainly from his public employment, and is not avoided by any quantity of diligence. Another distinction which has been made between persons undertaking the carriage of goods for hire, and to be responsible for their safe delivery, is, that a private carrier is not obliged, like a common carrier, to undertake in that way. All persons who carry under a special contract, as the driver of a stage-coach occasionally taking packages to carry for compensation, are private carriers.⁴ (a) Or, as in *Satterlee v. Groat*,⁵ a person who sends his servant to transport goods belonging to another person, from one place to another, with special instructions not to take the goods of any other person, incurs no other liability than that of a private carrier for hire, in case of the loss of the goods. But as to who are common, as distinguished from private carriers, and as to the peculiar character and responsibility of the former, the reader is referred to the chapters following; the object at present being to

¹ *Gilbart v. Dale*, 1 Nev. & P. 22; 5 A. & E. 543.

² *Dover v. Mills*, 5 Car. & P. 175.

³ *Penobscot Boom Corp. v. Baker*, 16 Maine, 233.

⁴ *Beekman v. Shouse*, 5 Rawle, 179. *Sheldon v. Robinson*, 7 N. H. 157.

⁵ *Satterlee v. Groat*, 1 Wend. 272.

(a) An owner of a vessel specially employed to make a trip for a load of grain, for which he is to receive a certain sum of money, is not a common carrier, in the absence of evidence that he offered his vessel to the public for use, or held himself out as a common carrier. *Allen v. Sackrider*, 37 N. Y. 341.

consider the liability of such persons only who carry for hire, and who are not common carriers. Any person carrying for hire who does not come within the definition and explanation to be given of a common carrier, is a private carrier, and therefore bound to only ordinary diligence.¹

§ 47. Ordinary diligence; to which a private carrier for hire is bound, is such diligence as every prudent man commonly takes of his own goods,² and ordinary negligence is therefore the want of such diligence.³ As it is ordinarily a good defence for a private carrier for hire, that the loss or injury to the goods was occasioned by unavoidable accident,⁴ or by such means that he could not have guarded against it by any ordinary diligence,⁵ he will not be liable for any loss by robbers, or for any taking from him or his servants by force.⁶ According to Lord Holt, in *Coggs v. Bernard*, if a bailiff or factor carries goods, and is robbed, he is not answerable to the owner, although he is to be paid for his service, "because it is only a particular office and private trust, and he doth the best he can, as the nature of the thing puts it in his power to perform it."⁷ This doctrine has been recognized in the modern case of *Brind v. Dale*,⁸ by Lord Abinger, who considers, that "if a man agrees to carry goods for hire, although not a common carrier, he thereby agrees to make good all losses arising from the negligence of his servants, although he would not be liable for losses by thieves or by any taking by force."

§ 48. But the propriety of the distinction taken in the civil law between a public palpable robbery by force, and a secret theft or purloining of goods, is obvious. It is, that in the one case, the bailee relieved himself from responsibility for the loss by proof of the mere fact of the robbery;⁹ it being very sensibly considered that individual vigilance could avail but little against the open attack of the determined robber.¹⁰ In the other case, he was

¹ See *Ross v. Hill*, 2 C. B. 877; 3 Dowl. & L. 788. ⁶ *Taunt.* 577; *Beekman v. Shouse*, 5 Rawle, 179.

² See *ante*, §§ 6, 9, 11.

⁶ Story on Bailm. § 457.

³ See *ante*, § 10; *White v. Winnisimmet Co.* 7 Cush. 155.

⁷ *Coggs v. Bernard*, 2 Ld. Raym. 909.

⁴ See 2 Greenl. Ev. § 219.

⁸ *Brind v. Dale*, 8 Car. & P. 207.

⁵ Per the court, by Bronson, J., in *Hollister v. Nowlen*, 19 Wend. 239. And see *Hodgson v. Fullarton*, 4 Taunt. 787; *Hatchwell v. Cooke*,

⁹ Dig. Lib. 17, tit. 2, lex 52, 53. Inst. Lib. 3, tit. 15, §§ 2, 3, cited in Add. on Contr. 773.

¹⁰ *Adversus latrones parum prodest*

bound to make good the loss, unless he could show that he had taken the greatest care of the thing intrusted to him; and that it had been purloined, notwithstanding every precaution for its safety.¹ There are cases in which it has been considered that, by the common law, a loss by secret purloining of goods in the hands of a carrier for reward, is *primâ facie* evidence of a want of ordinary diligence in keeping, and this presumption the carrier must rebut, by showing that he had observed ordinary diligence, or, in other words, that he had taken all such precautions as appear to be necessary to guard against the theft. In an action against the commander of a ship of war, for the loss of a quantity of bullion, the plaintiff declared that, in consideration that he had caused to be delivered to the defendant certain casks of dollars, to be carried on a voyage from the River Plate to London, upon freight, for certain hire and reward, the defendant undertook to take care of them, and assigned for breach, that he took so little care of them that they were lost; and it appeared on the trial, that on the arrival of the ship in the Thames, two of the casks had been opened and plundered by the crew; it was considered that the very occurrence of the loss was *primâ facie* evidence of negligent keeping on the part of the defendant, and it was held that he was responsible for the loss.²

custodia; adversus furem prodesse potest si quis advigilet. Gothofred, Jur. Civ., cited in Jones on Bailm. 44.

¹ Ad casus, autem, fortuitos non sunt referendi illi casus qui cum culpa conjuncti esse solent; cujusmodi sunt furta. Quamobrem, qui rem furto amissam dicit, si diligentiam suam probare debet. Vin. Com. ad Inst. lib. 3, tit. 15, § 5. Pothier, Pret. à Usage, art. 53. Robinson v. Ward, Ryan & M. 276. And see Add. on Contr. 773.

² Hodgson v. Fullarton, 4 Taunt. 787. And see also Hatchwell v. Cooke, 6 Taunt. 577. Sir William Jones has given an opinion, that a loss by private theft is presumptive evidence of ordinary neglect. Jones on Bailm. 38, 40, 66, 77, 109. But Story has endeavored to prove that the common law warrants no such presumption as

Sir William Jones supposes. "Abstractly speaking," says he, "there is nothing in the case of theft from which we have a right to infer, that because a loss has happened by it, there must have been some neglect. (Vere v. Smith, 1 Vent. 121; S. C. 2 Lev. 3.) On the contrary, no degree of vigilance will always secure a party from losses by theft. A store may be broken open, however securely locked; a person may be robbed while riding in a stage-coach, or while asleep; a servant may be faithless, and betray the confidence reposed in him; a person may be seized with a sudden fit, or alienation of mind, and the theft committed without any consciousness on his part. In these and in many other cases there would not be any presumption of neglect. And the civil law itself supposes, that, in such

§ 49. It is not only in the case, as in the above case, of the carriage of merchandise on the high seas, that the loss of goods in a port or harbor affords a *primâ facie* presumption of negligence and want of care, and that the undertaker of the work of carrying, in order to escape from responsibility in respect of such loss, must prove that he had taken proper care of the goods intrusted to him, and must show that the loss was occasioned by a forcible robbery, which he could not resist; but in the case of the carriage of valuable chattels by land, the person who receives them to be carried by him for hire, cannot set up a mere loss of the property by the way, as an answer to an action for the non-delivery of them according to his undertaking. Thus, in an ancient case, where the declaration, in an action of assumpsit, alleged that the plaintiff delivered to the defendant £3, to be carried to an inn in Southwark; that the defendant, in consideration of the premises, and for that the plaintiff did undertake "reasonably to content him for the carriage," promised safely to convey it thither, and deliver it at the said inn to the plaintiff, but that he had not done so; it was held, that the defendant, who had accepted the money to be carried, was liable upon such a promise, although he was not a common carrier, and although no sum certain had agreed to be paid him as the price of the carriage.¹ Thus also in a very modern case, where a traveller hired a cab for the conveyance of himself and his luggage to the Great Western Railway Station at

cases, the bailee might repel the imputation of negligence. By our law, in many cases, a bailee is excusable when the loss is by theft; but never when that theft is occasioned by gross negligence. So long ago as the reign of Edward the Third (29 Assisarum, 28), it was held, that if a person bail his goods to keep, and they are stolen, he is excused. The reasoning of the court in *Coggs v. Bernard*, shows that the court did not consider theft as *primâ facie* presumptive of negligence. In short, our law considers theft, like any other loss, to depend for its validity as a defence upon the particular circumstances of the case, and to be governed by the general nature of the bailment, and the responsibility attached thereto. It nei-

ther imputes the theft to the neglect of the party, nor, on the other hand, exempts him from responsibility from that fact alone. But it decides upon all the circumstances, as leading to the conclusion, that there has or has not been a due degree of care used." *Finucane v. Small*, 1 Esp. 315. Story on Bailm. § 39. Now, it may be observed, that the concluding remark, which is a summary of the argument preceding it, expresses Sir W. Jones's opinion, with which, also, the whole argument so well agrees, that it is difficult to discover any difference between them. The difference, if any, is, at most, merely formal. See note to Theobald's edition, Jones on Bailm. p. 43.

¹ *Rogers v. Head*, Cro. Jac. 262.

Paddington, and the luggage was placed on the outside of the cab, but on the arrival of the vehicle at the railway station, a portion of it was found to be missing; it was held, that the law would imply, from the acceptance of the luggage by the cabman to be carried, together with the passenger, for hire, a promise from him "safely and securely" to carry it, and that he was responsible for the portion of it lost by the way.¹

§ 50. The very occurrence of loss or damage to the goods delivered to a private bailee for hire seems, therefore, to be cogent evidence of want of care. Thus, where a puncheon of rum was staved by the servants of the defendant whilst it was being lowered into the hold of a vessel, and the contents were scattered and lost, the very occurrence of the disaster was considered to be an irresistible proof of negligence in the execution of the work.² In *Mackenzie v. Cox*, at *Nisi Prius*,³ it was held, that if A place a dog with B, and the dog be received by B, to be kept by him for reward, to be paid to him by A, B is not answerable for the loss of the dog, if he took reasonable care of it; but if the dog be lost, the *onus* lies on B to acquit himself by showing that he was not in fault with respect to the loss.

§ 51. But in most cases the question of ordinary negligence is more a question of fact to be determined by the jury, than of law;⁴ and, as has been fully explained, depends much upon particular facts and circumstances, and upon the customs and habits of the age or country, the nature and value of the property, &c.⁵

§ 52. Agistors of cattle, like private carriers for hire, come within the rule of responsibility of ordinary negligence;⁶ and very slight evidence of neglect has been sufficient to induce juries to return verdicts in favor of those who have sought compensation for the loss of cattle delivered to bailees to be kept for hire. Thus, where the defendant, a farmer, had received the plaintiff's horse to agist for a certain price, and the horse strayed away and was lost, and never after heard of, and the plaintiff gave evidence of the gates having been occasionally seen left open, and the fences

¹ *Ross v. Hill*, 2 C. B. 877; 3 Dowl. & L. 788.

² *Goff v. Clinkard*, cited 1 Wils. 283. And see *Coggs v. Bernard*, 2 Ld. Raym. 909.

³ *Mackenzie v. Cox*, 9 Car. & P. 632.

⁴ As in the question of gross negligence, see *ante*, §§ 22, 27-29.

⁵ See *ante*, §§ 7, 8, 11, 16; *Walker v. Jackson*, 10 M. & W. 161; *Green v. Hollingsworth*, 5 Dana, 173.

⁶ *Story on Bailm.* § 443. *Jones on Bailm.* 91, 92.

being in part out of order, but it did not appear that the horse had strayed through any defect in the fences, or through any of the gates left open; the jury, nevertheless, returned a verdict against the defendant for the full value of the horse.¹

§ 53. In the case of *Beck v. Evans*,² the plaintiff had sent a cask of brandy by the defendant's wagon from Shrewsbury to London. Before the wagon reached Birmingham, the cask was leaking fast, and the driver was informed of it; he delayed three hours at Birmingham without attempting to stop it, passed through Wolverhampton, where he made some stay, and at the next stage beyond Wolverhampton, having some parcels to deliver, he took the cask out, and the remainder of the brandy was saved. It was left to the jury to consider, whether the injury arose from the negligence of the defendant's servant, the wagoner, in not examining the cask after he was informed of its leaky state, at either of the places where he halted; which being found in the affirmative, a verdict was taken for the full amount of the loss. A rule to set aside this verdict, on the ground of the misdirection of the judge, was moved for, and refused, in the Court of King's Bench.

§ 54. In England, at least, the doctrine is clearly settled, that a common carrier may limit the extraordinary liability which the law imposes upon him as such, by a special acceptance that he will not be liable, or by a public notice to that effect, of which the owner of the goods has knowledge; and in such cases the common carrier descends to the situation of a private carrier for hire, and it is therefore enough to prove ordinary negligence, to render him liable in case the goods are lost or damaged in consequence.³ In a case in the Exchequer, the defendants, who were the proprietors of a public stage-coach, and had published the usual notice limiting their liability as common carriers, received from the plaintiff a valuable bank parcel, to be conveyed from Hertford to Brecon, for which they were paid the usual hire. When the coach arrived at Brecon, the driver was in liquor, and although the entry in the way-bill was known to the book-keeper, no search or inquiry was made for the parcel, and it was in consequence lost. The jury having found that there was gross negligence on the part

¹ *Broadwater v. Blot*, Holt, N. P. 547. And see *ante*, § 24; and *Mosley v. Fosset*, 1 Roll. Abr. 4, per Popham, C. J.

² *Beck v. Evans*, 16 East, 244.
³ *Wyld v. Pickford*, 8 M. & W. 461.
Hinton v. Dibbin, 2 Q. B. 646.

of the defendants, they forfeited the benefit of the notice, and were obliged to make good the whole loss. Baron Graham said, that he "perfectly agreed with the counsel for the defendants, that they would not have been liable if ordinary diligence had been used ;" so that it was for the omission of this diligence (which is the definition already given of ordinary neglect¹) that made them liable.²

§ 55. In *Smith v. Horne*,³ a parcel had been sent from Worcester to London, by the defendant's coach. It arrived in London, and was taken from the defendant's office in a cart, under the direction of one person only (it being the usual practice to employ two persons for that purpose). This man left the cart unprotected in the street, while he went to different houses to deliver other packages. Notwithstanding the notice of the defendant as a common carrier, he was held liable, like a private carrier for hire, for the full value.

§ 56. It seldom happens that persons undertake the carriage of goods for hire, who are not common carriers, and the rule in respect to common carriers is, as has already been stated, that they are not excused in case of loss of or injury to the goods, except by the act of God or the public enemy. But if the loss or injury by such means is conducted by their negligence or want of skill, or by insufficiency of vehicle, they do not come within those two exceptions. Many of the authorities, therefore, which will be cited in a subsequent chapter on the responsibility of common carriers,⁴ are illustrative of the general doctrine of liability in these cases, and therefore they will be found to illustrate the law applicable to private carriers for hire.

§ 57. It is a well-settled principle, that if the owner of the goods in the hands of a private bailee should in any way conduce to the loss, or the loss is as likely to have arisen from the misconduct of the owner, or his want of care, the carrier is not responsible for the loss. This is a rule which of course should apply to all bailees for hire, and has in fact been applied to a warehouseman. Thus, where a quantity of ginseng contained in a box was deposited by the plaintiff in the defendant's warehouse, and the plaintiff was in the habit of resorting to the box, and ordering the lid to be taken off for the purpose of showing the ginseng to expected purchasers

¹ *Ante*, §§ 10, 23, and *post*, § 268.

³ *Smith v. Horne*, 8 Taunt. 144 ; 5

² *Bodenham v. Bennett*, 4 Price, B. & Ald. 57.

81.

⁴ Chap. VI.

who came to the warehouse to view it, on the invitation of the plaintiff, and rats got into the box and destroyed the ginseng ; it was held, that the defendant, the warehouseman, was not responsible for the loss.¹ On the same principle, if the owner of the goods in the hands of a private carrier accompanies the goods to take care of them, and is himself guilty of negligence, by which the goods are lost ; or if there is as much reason to attribute the loss to the negligence of the one party as the other, the carrier is not liable.² In *Whalley v. Wray*,³ the damage complained of happened distinctly by the owner's neglect. This was an action of assumpsit against the defendant, as a lighterman, for damage done to the plaintiff's goods which had been intrusted to him to be deposited in the plaintiff's warehouse ; and the facts of the case were, that before the goods could be permitted to be landed, it was necessary to present a petition to the commissioners of the customs, who refer it to the land-surveyor, upon whose report the goods are permitted to be landed. A petition had been presented by S., who was the custom-house agent, to the plaintiff ; but no report having been made of it, the land-surveyor refused to permit the goods to be landed ; in consequence of which they remained in the lighter undischarged, where they received the damage for which the action was brought. The presenting of the petition, &c., was usually done by the custom-house agent of the party to whom the goods belonged, and was not usually done by the lighterman. By Lord Eldon : " To entitle the plaintiff to recover, it must appear that the loss happened by the neglect of doing that which was the regular and common duty of the defendant. The law raises no presumption of what is his duty ; that is a matter of evidence ; here it is in evidence, that the presenting the petition, and the subsequent proceedings, was the business of the custom-house agent of the plaintiff, not of the lighterman ; if there had been any contract, or undertaking on the part of the lighterman, by the neglect of which the goods were spoiled, it

¹ *Cailiff v. Danvers*, 1 Peake, N. P. 114. As to destruction caused by rats, see *post*, Chap. VI. A carrier for hire, who is also a warehouseman, may be responsible in the latter character, for the loss of the goods after he has deposited them in his warehouse. *Cairns v. Robbins*, 8 M. & W. 258.

² Per Lord Abinger, in *Brind v. Dale*, 8 Car. & P. 207. And see *Robinson v. Dunmore*, 2 Bos. & P. 417.

³ *Whalley v. Wray*, 3 Esp. 74.

should have been the object of a special count; the plaintiff has relied on the general liability of the defendant, without making it out in evidence that it was the duty of the defendant to have done that from the neglect of which the loss has arisen." But whether the loss did proceed from the negligence of the owner of the goods, or whether it may have so proceeded, may sometimes be a question to be submitted to the jury with the circumstances attending the particular case.¹

§ 58. A bailee for reward is liable for injury to goods occasioned by his negligence, although it appear that, after the happening of the injury, the goods were destroyed without his fault, and that they must have been so destroyed, even if no damage had previously occurred. In an action on the case against a warehouseman, it appeared on the trial that several boxes of furniture, clothing, &c., belonging to the plaintiff, were deposited with the defendant, a warehouseman and oil merchant, to be stored for hire. The goods were placed in a lower room of the defendant's store, and while remaining there were seriously injured by the drippings of the oil from leaky casks in the second story. Afterwards the goods were destroyed by a sudden freshet, which caused the water of the river near to which the warehouse stood to rise and flow into the room where they were deposited. Every exertion was made by the defendant's servants to save the goods from injury. It was held by the court that the defendant was no more released from his liability for the injury done by the oil through his negligence, before the flood, than he would have been under like circumstances, if he had carelessly permitted the goods to be stolen or burned. In such a case, he might have contended with as much propriety as in the case in question, that he ought not to be held responsible for the consequences of his own neglect, because the goods would have been destroyed by the flood if no loss or damage had previously occurred. It could not be denied that a cause of action to recover the full amount of damages that had already been sustained existed before and at the time of the destruction by the flood; and unless, the court held, the defendant could find some principle which would enable him to plead the flood in bar of an action of his own previous wrong, his liability must continue. The flood might excuse the defendant for injuries happening through its agency, but nothing further.²

¹ Bowman v. Teall, 23 Wend. 306.

² Powers v. Mitchell, 3 Hill, 545.

§ 59. Although the degree of care required of a private person who undertakes the carriage of goods for hire extends only to the responsibility for ordinary negligence, yet that responsibility may be increased or diminished by special contract.¹ In the first place, it may be increased so as to render the carrier liable to the same extent even as a common carrier by his particular warranty. In *Robinson v. Dunmore*,² the plaintiff, an upholsterer, delivered to the defendant, to carry for hire, with a horse and cart, some furniture into the country; and the plaintiff having observed that the tarpaulin which the defendant had brought for the purpose of covering the cart was too small, the defendant said, "I will warrant the goods shall go safe." In the course of the journey the goods were damaged by rain, and a verdict was found for the plaintiff, under the direction of Lord Eldon, C. J. On a motion that the verdict might be set aside and a nonsuit entered, the verdict was held right. Heath, J., observed: "The defendant in this case is not charged as a common carrier,— he is charged on a special undertaking; and the jury have found on good grounds that the undertaking stated in the declaration was made by the defendant. They had decided, upon considering the whole transaction, that the words used by the defendant amounted to a warranty, and we cannot say that they have done wrong." Chambre, J., considered it a very clear case, and said: "The defendant is not a common carrier by trade, but has put himself into the situation of a common carrier by his particular warranty." It was further held that the circumstance that the plaintiff sent one of his own servants in the defendant's cart to look after the goods made no difference, as it was more for the plaintiff's interest that the property should not be lost than that he should have an action against the carrier.³ In the second place, the implied liability of

¹ See on this subject, *ante*, § 37; Jones on Bailm. 97. And see the civil law compared with the common law on the subject, Story on Bailm. §§ 33–35, 68–74; *Brind v. Dale*, 8 Car. & P. 207; *post*, Chap. VII., as to the limitation of a common carrier's liability by special contract.

² *Robinson v. Dunmore*, 2 Bos. & P. 417.

³ And see *Calye's case*, 8 Co. 33.

When the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, then the law will excuse him. But when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity. See opinion of Rogers, J., in *Hand v. Baynes*, 4 Whart. 214; *Paradine v.*

a private carrier for ordinary diligence may be diminished by special agreement or acceptance. In *Alexander v. Green*,¹ it was held that a contract to tow a boat "at the risk of the master and owners thereof" did discharge the paid undertaker from liability for every risk arising from a want of ordinary skill; but that no man could, by any contract, exempt himself from liability for his fraudulent acts.² Indeed, there is no reason why bailees (at least other than common carriers) may not contract either for a larger or a more restricted responsibility than that which the law imposes upon them, in the absence of any special contract. They may become insurers against all possible hazards, or they may say we will answer for nothing but a loss happening through fraud or want of good faith.³ Where the defendants contracted for hire to take a vessel through the ice out of the harbor of B., and there was no express agreement that they should be responsible for any loss or injury which might happen, if the vessel was not carried through in safety, the defendants were bound to reasonable diligence.⁴

§ 60. But even an express promise by a private carrier to carry goods safely is but the undertaking implied by law to carry them free from ordinary negligence, and does not insure against losses by robbers or any taking by force.⁵ Blackstone lays down the rule, that "if the bailee undertakes specially to keep the goods safely and securely, he is bound to the same care as a prudent man would take of his own";⁶ that is, he is bound to ordinary

Jane, Aleyn, 27; *Hadley v. Clark*, 8 T. R. 259; *Brecknock Canal Nav. v. Pritchard*, 6 T. R. 750. (a)

¹ *Alexander v. Green*, 3 Hill, 9.

² See *ante*, § 37. And, as to fraud, see *ante*, §§ 10, 35.

³ *Wells v. Steam Nav. Co.* 2 Comst. 204. The responsibility of a public receiver depends on his special contract, and not on the law of bailments; and in a case where his special contract was to pay over the amount received, it was held to be no defence by his surety that the money was stolen, though the jury find it was kept as a prudent man would keep

his own funds. *Commonwealth v. Comly*, 3 Barr, 372.

⁴ *Penn. Steam Nav. Co. v. Dandridge*, 8 Gill & J. 248.

⁵ Story on Bailm. §§ 33, 457, and *ante*, §§ 20, 37.

⁶ 2 Bl. Com. 452. The learned judge who delivered the opinion of the court in *Foster v. Essex Bank*, 16 Mass. 479, seemed to think that there is much to warrant the suggestion that, in a case where the bailment is to keep safely, the depositary would not be liable for a loss by theft, unless it should arise from his own negligence and want of due diligence and

diligence. Indeed, the words "safely and securely" are always to be construed with reference to the promise implied by law from the peculiar relation of the parties, and not in their more literal sense. In *assumpsit* against a cab proprietor, the declaration stated that the plaintiff hired the vehicle, and that in consideration of the premises, and that the plaintiff with his luggage would become a passenger, and of a certain reward, the defendant promised the plaintiff to carry and convey him and his luggage "safely and securely" from, &c. to &c., and alleged a loss of part of the luggage by the negligence of his servant. It was held that the declaration was sufficient to charge the defendant for a breach of his implied duty to use an ordinary degree of care, the words "safely and securely" not necessarily importing a more extended liability.¹ In this case, Tindal, C. J., said that it could only be argued and inferred from the cases, that "we are to construe these words *salvo et secure* with reference to the duty or the promise implied by law from the particular position and relation of the parties, and not in the stricter sense contended for on the part of the defendant. In the present case the plaintiff hired a cab to convey himself and his luggage to a certain place. The undertaking charged in the declaration, 'safely and securely' to convey the plaintiff with his luggage to his destination, means no more than safely and securely with reference to the degree of care which, under the circumstances, the law required of the defendant; that is, that he shall use such a reasonable degree of care, that the plaintiff shall incur no damage or loss through his, the defendant's, negligence or default. If it had appeared that the defendant was a common carrier, his duty would have been to carry and deliver safely, at all events, without excuse, unless prevented by the act of God or the Queen's enemies. If, on the other hand, he had been a mere gratuitous bailee, then a less degree of care and caution would have been required of him than is required from a bailee for reward. The words 'safely and securely,' therefore, receive different interpretations with reference to the character in which the defendant is charged. I cannot help thinking that this is expressly decided in *Coggs v. Bernard*."²

care. See *Whitney v. Lee*, 8 Met. 91.

² *Coggs v. Bernard*, 2 Ld. Raym. 909.

¹ *Ross v. Hill*, 2 C. B. 877; 3 Dowl. & L. 788.

§ 61. According to the opinion of Lord Abinger, in *Brind v. Dale*,¹ in cases of the carriage of goods for hire, by persons who are not common carriers, the *onus probandi* is on the plaintiff to show that the loss has been by the negligence of the carrier or his servants. But in fact there are discrepancies in respect to depositaries for hire in general, whether the *onus probandi* for negligence lies on the plaintiff, or of exculpation on the defendant in an action for the loss.² In some cases in England, it has appeared that the latter rule is maintained;³ yet in cases other than in the one of *Brind v. Dale*, the *onus* of proving negligence lies on the plaintiff.⁴ In this country it is considered that the weight of authority coincides with the opinion that the burden of proof is on the plaintiff, although an inclination of opinion has sometimes been expressed the other way.⁵ With regard to the

¹ *Brind v. Dale*, 8 Car. & P. 207.

² See Story on Bailm. § 454.

³ *Ante*, §§ 48-50.

⁴ It has been ruled in England, in case against a depositary for hire, that proof merely of the loss, where the goods were stolen by his servants, is not sufficient to put the bailee on his defence; and that the burden of proof of negligence is on the bailor. *Finacune v. Small*, 1 Esp. 314. In another case, in an action against a pawnee for a negligent loss of the pawn, it is held, that it is incumbent on the plaintiff to support the allegations of his declaration by competent proofs, and the burden of proof, in respect to negligence, is thrown on him. *Cooper v. Barton*, 3 Camp. 5. In *Harris v. Packwood*, 3 Taunt. 264, which was the case of a special acceptance by a common carrier, but who yet was held liable for actual negligence, Lawrence, J., charged the jury, that the *onus* of proving care lay with the defendant; but the court held otherwise, on a motion for a new trial; and that express negligence must be shown by the plaintiff. This case is understood as going that length by Abbott, C. J., in *Marsh v. Horne*, 5 B. & C. 322. A similar case is re-

ported in 1 H. Bl. 298, *Clay v. Willan*.

⁵ Story on Bailm. § 454. That negligence must be shown by the plaintiff is maintained in *Newton v. Pope*, 1 Cow. 109. In *Platt v. Hibbard*, 7 Cow. 497, Walworth, Ch., told the jury that, in all cases of bailment of property to one who carries on the business of receiving it into his custody for reward, it is necessary that a strict rule should be enforced against the bailee to prevent fraud. Hence, when property intrusted to a warehouseman, wharfinger, or storing and forwarding merchant, in the ordinary course of business, is lost, injured, or destroyed, the weight of proof is with the bailee, to show a want of fault or negligence on his part; or, in other words, to show the injury did not happen in consequence of his neglect to use all that care and diligence on his part that a prudent or careful man would exercise in relation to his own property. In *Clarke v. Spence*, 10 Watts, 335, Rogers, J., in delivering the opinion of the court, said: "It is to be regretted that this is not the rule, but it seems to be contrary to the current of authority, as has been clearly shown by the cases cited

breaking down and overturning of a stage-coach, it seems that either of those events is *prima facie* evidence of negligence on the part of the proprietor and his servants.¹(a)

at the bar. The rule is, when a loss has been proved, or when goods are injured, the law will not intend negligence. The bailee is presumed to have acted according to his trust, until the contrary is shown. But to throw the proofs of negligence on the bailors, it is necessary to show, by clear and satisfactory proof, that the goods were lost, and the manner they were lost. All the bailor has to do in the first instance is to prove the contract and the delivery of the goods, and this throws the burden of proof that they were lost, and the manner they were lost, on the bailee, of which we have a right to require very plain proofs." (b) See also, to the same effect, *Beckman v. Shouse*, 5 Rawle, 179. In *Schmidt v. Blood*, 9 Wend. 268, the court held, that a warehouseman, not chargeable with negligence, is not responsible for goods intrusted to him if stolen or embezzled by his storekeeper or servant, and the *onus* of showing negligence lies on the owner. The Supreme Court of Ten-

nessee hold that, "in a bailment for hire, the *onus probandi* of negligence is upon the bailor; and that, after the bailor has proved the contract and delivery of the goods, the burden of proof is upon the bailee to show their loss and the manner they were lost, and this throws the proof of negligence upon the bailor." *Runyan v. Caldwell*, 7 Humph. 134. The above case of *Platt v. Hibbard*, 7 Cow. 497, was commented on and disapproved by the court in *Foote v. Storrs*, 2 Barb. 326, in which it was held, that in all cases where a defendant is bound only to ordinary care, and is liable only for ordinary neglect, the plaintiff cannot reason upon the mere proof of the loss of the articles intrusted to the bailee; and that the *onus* is on the plaintiff to give some evidence of a want of care in the bailee or his servant. As to the *onus probandi*, in cases of carriers without hire, see *ante*, § 38.

¹ *Christie v. Griggs*, 2 Camp. 79. *Stokes v. Saltonstall*, 13 Pet. 181.

(a) See *post*, § 569.

(b) *Verner v. Sweitzer*, 32 Penn. State, 208. Where the action was against the defendants as warehousemen, and the declaration alleged that the defendants received the property of the plaintiff, and agreed to deliver it to him at a certain place for a legal consideration, that he duly demanded it of them, but they neglected and refused to do so, the burden of proof is on the defendants to show loss without their fault, the acceptance and non-delivery being proved. *Cass v. Boston & Lowell R.* 14 Allen, 448. In *Pitlock v. Wells*, 109 Mass. 452, there was evidence that a sealed packet containing money was delivered to some person in the defendant's office in New York, addressed to a person in Boston, that, at the time of the delivery, the question was asked whether it was necessary to pay charges, and the reply was that it was not; that demand was made in Boston and the package was not delivered, search was made and the package could not be found. The defendant denied that he had received the package, and also contended that he was not a common carrier between New York and Boston. The jury found that the defendant was not a common carrier, and the only

§ 62. By the civil law, as has already been shown,¹ the settled doctrine is, that in all cases of theft, the burden of proof is thrown upon the bailee to repel the presumption of negligence. And by the French law, where a loss or injury happens to a thing deposited for hire, the burden of proof is in like manner thrown upon the hirer to repel the presumption.² By the Scottish law, if any specific injury has occurred not manifestly accidental, the *onus probandi* lies on the bailee to justify himself by proving the accident.³

§ 63. The common law does not probably differ from the civil law as to the *onus probandi*, after a due demand of the property and refusal. The demand and refusal would be evidence, as has been seen, of a tortious conversion, so that it would then be incumbent on the bailee to give evidence of a loss by casualty or superior force, and independent of his own statement.⁴ It has been said, in respect to depositaries not for hire, that the distinction would seem to be, that when there is a total default to deliver the goods bailed, on demand, the *onus* for accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use, and trover will lie.⁵ It may,

¹ *Ante*, § 48.

² Poth. *Contrat de Louage*, n. 194, 199, 200. *Code Civil of France*, art. 1732 *et seq.*, cited in *Story on Bailm.* § 454. As to civil-law authorities, see *Story on Bailm.* §§ 278, 339, 411.

³ 1 Bell, *Com.* 454 (5th ed.).

⁴ *Ante*, § 38. *Story on Bailm.*

§ 339. A demand and refusal is ordinarily evidence of a conversion, unless the circumstances constitute a just excuse. *Phillpot v. Kelley*, 3 A. & E. 106. *Cranch v. White*, 1 Bing. N. C. 414.

⁵ See note to the case of *Platt v.*

Hibbard, 7 Cow. 500. Proof of the

question was whether there was evidence to go to the jury that the defendant was liable as bailee, either for money had and received, or in trover for the conversion. The court held that there was not. The evidence was held to show only an involuntary or gratuitous bailment; that, as there was no evidence that the defendant ever had possession of the money except in a sealed package, the count for money had and received would not lie; that to charge the defendant on the ground of negligence something more must be shown affirmatively than that the package could not be found nor accounted for, upon search. It appeared in evidence, however, that the defendant was a common carrier from San Francisco to Boston, and that it is difficult to see how the receipt without objection in New York of a package marked for Boston, with the answer to the question, "Whether it was necessary to pay charges?" could be deemed either an involuntary or gratuitous bailment. See *Gott v. Dinsmore*, 111 Mass. 45; *Roberts v. Gurney*, 120 Mass. 32.

therefore, be different where a *prima facie* case of trover is made out, from what it would be in an action of assumpsit, or an action on the case founded on negligence.¹ In many complicated cases of evidence, the burden of proof may alternately shift from one party to the other, in different stages of the trial.²

§ 64. In an action against a bailee for negligence, it appears that his conduct and his statements contemporaneous with the loss are admissible evidence in his favor to establish the nature of the loss, or how it occurred; but the jury are to decide in reference to all the circumstances, and are at liberty either to believe or disbelieve the bailee's statement, or own account.³

§ 65. In a suit against a carrier for goods lost, the promise of the carrier, after the commencement of the suit, to pay for the goods if the plaintiff would swear to a list of them, was held an admission of the carrier's liability; and an affidavit of the plaintiff, made in pursuance of such promise, is admissible in evidence to the amount of demand.⁴

§ 66. Upon general principles it would seem that warehousemen, wharfingers, and private carriers for hire ought to have a specific lien on the thing for their labor and services, like artisans; but it is a matter upon which, it is said, the authorities present no rules for a guide.⁵ (a) Warehousemen and wharfingers have

loss of goods by a carrier will not be sufficient to maintain a count in trover. But a demand and non-delivery are evidence of a conversion, and are sufficient, unless the carrier can give some legal excuse. *Ross v. Johnson*, 5 Burr. 2825; 2 Salk. 655. A judgment in an action of assumpsit, against a bailee, for a breach of his contract to transport and deliver the property bailed, in which the owner has recovered damages for the value of the property, without satisfaction, is no bar to an action of trover against a third person, who has purchased the property of the bailee. *Hyde v. Noble*, 13 N. H. 494.

¹ *Ante*, § 38.

² Story on Bailm. § 278.

³ *Doorman v. Jenkins*, 2 A. & E.

256. *Tompkins v. Saltmarsh*, 14 S. & R. 275. And see *ante*, § 40.

⁴ *Hurd v. Pendrigh*, 2 Hill, 502. And see *Brooks v. Ball*, 18 Johns. 337.

⁵ Story on Bailm. § 453 *a* (edit. of 1846). In respect to a specific lien, it has been laid down as a general rule, that where a bailee spends labor and skill in the improvement of the chattel bailed, he has a lien on it. *Bevan v. Waters*, 1 Moody & M. 235. But it has been added, that his lien is confined to cases where additional value has been conferred by him on the chattel, either directly, by the exercise of personal labor or skill, or indirectly, by the intervention of any instrument over which he has control. *Scarfe v. Morgan*, 4 M. & W. 270. *Jackson v. Cummings*, 5 M. &

(a) See *Dresser v. Bosanquet*, 4 Best & S. 460.

sometimes in England a lien by custom ;¹ (a) and it has been held in Pennsylvania that warehousemen have a specific lien, although it cannot be said that by care and skill they have, like artisans, improved the thing bailed.² Chief Justice Gibson, who delivered the opinion of the court in this case, held, that on the ground of principle it was not easy to discover why the warehouseman should not have the same lien for the price of future delivery as that of a carrier (common carrier) has. The one delivers at a different time, the other at a different place ; the one after custody in a warehouse, the other in a vehicle ; and that was all the difference. It was true that the measure of a common carrier's responsibility was greater ; but that, though a consideration to influence the quantum of his compensation was not a consideration to increase the number of his securities for it. The learned judge, in short, understood the law to be, that a warehouseman (and a private carrier stands on the same footing) stands on a footing with a common carrier, whom in this country he closely resembles.

W. 342. Upon this latter ground it has been held in England, that an agistor of cattle has no lien on the cattle for the pasturage consumed. This doctrine (Story on Bailm. *ub. sup.*) has as yet not been recognized in this country ; and certainly it is not without its difficulties. In its application to livery-stable keepers, it may be admitted, because there would seem to be an implied contract to deliver the animal at the mere pleasure of the owner.

¹ *Rex v. Humphrey*, 1 M'Clel. & Y. 194. *Lockhart v. Cooper*, 1 Scott, 481. Where no lien exists at common law, it can only arise by contract with the particular party, either express or implied ; it may be implied either from previous dealings between the same parties upon the footing of such a lien, or from a well and long established usage of trade, so general as that the jury must reasonably presume that the parties knew of and adopted it in their dealing. *Rushforth v. Hadfield*, 7 East, 224. There

is a well-known distinction between a commercial lien, which is the creature of usage, and a common-law lien, which is the creature of policy. The first gives a right to retain for a balance of accounts ; the second, for services performed in relation to the particular property. Commercial or general liens, which have not been fastened upon the law merchant by inveterate usage, are discountenanced by the courts as encroachments on the common law. Per Gibson, C. J., in delivering the opinion of the court in *Steinman v. Wilkins*, 7 Watts & S. 466. And see, as to the general principles of the law of lien, *Chase v. Westmore*, 5 Maule & S. 180 ; *Jacobs v. Latour*, 5 Bing. 132 ; *Kirkham v. Shawcross*, 6 T. R. 17 ; *Bevan v. Waters*, Moody & M. 235 ; *Jackson v. Cummings*, 5 M. & W. 342. See *post*, Chap. IX.

² *Steinman v. Wilkins*, 7 Watts & S. 466.

(a) See *Miller v. Mansfield*, 112 Mass. 260.

Now, common carriers, in virtue of the obligation they are under, by the "custom of the realm" to carry for a reasonable reward, have a lien for the carriage price of the particular goods; for, as the law imposes that burden, it gives them the power of retaining for their indemnity.¹ But it is held, in Pennsylvania, that the common-law rule, that common carriers are obliged to receive goods for carriage, at the current price, cannot properly be applied.²

CHAPTER IV.

WHO ARE COMMON CARRIERS.

§ 67. COMMON carriers are the second description of persons who have been mentioned³ as carrying for hire, and whose contract, in that capacity, belongs to the class of bailments denominated *Locatio operis*, and is styled *Locatio operis mercium vehendarum*.⁴ The trust created by this contract, being both for the benefit of the bailor and the bailee, the latter, if only a private carrier, is bound only to ordinary diligence, as appears by the preceding chapter. But a common carrier differs from a private carrier in two important respects: 1. In respect of duty, he being obliged by law to undertake the charge of transportation, which no other person, without a special agreement, is. It is not even necessary, to charge him as carrier, that a specific sum should be agreed upon for carriage, although he is entitled to reasonable compensation. 2. In respect of risk. A common carrier is regarded by the law as an insurer of the property intrusted to him; or, in other words, he is legally responsible for acts against which he could not provide, from whatever cause arising, the acts of God and the public enemy only excepted. The loss of, or damage done

¹ As will be shown in a subsequent chapter. Chap. IX. *Sage v. Gittner*, 11 Barb. 120. *Cox v. O'Riley*, 4 Ind. 368.

² *Gordon v. Hutchinson*, 1 Watts & S. 285. *Steinman v. Wilkins*, *ub. sup.* For a more full consideration

of the doctrine of lien as applied to carriers, see *post*.

³ *Ante*, § 1.

⁴ See the different divisions and subdivisions of bailments, *ante*, §§ 13-15.

to, property in his possession to be carried, is of itself sufficient proof of negligence; the maxims being that every thing is negligence which the law does not excuse; so that in all cases, but those just mentioned as excepted, his faultlessness is no discharge.¹ (a) This peculiar duty and this extraordinary responsibility imposed by the force of the general law upon a common carrier are to be extensively considered in subsequent chapters; but it is important to inquire beforehand when persons become common carriers, inasmuch as it would be unjust to impose upon an individual the duty and the responsibility just mentioned, until he has so conducted himself and so held himself out, as to have fairly assumed them.² Therefore it is proposed in the present chapter to consider, first, who are common carriers; (b) and secondly, whether the duties and obligations which persons have incurred by voluntarily becoming such extend alike to every description of thing.

§ 68. FIRST: The general law of bailments, as has before been mentioned,³ was so unsettled, from the reign of Elizabeth to the reign of Anne, as to have been in that interval the subject of surprising diversity of opinion and inconsistency of argument. But the rule of the above-mentioned extraordinary responsibility of a common carrier seems to have been first established in the commercial reign of the former, upon the principles of policy and convenience, or to favor and encourage commerce by guarding against the carrier's collusion and combination with thieves and robbers.⁴ Lord Chief Justice Holt, in the case of *Coggs v. Bernard*,⁵ which was decided in the second year of the reign of Anne, in enumerating and expounding the different sorts of bailments, mentions the one of the carriage of goods for hire as "a delivery to carry for a reward to be paid to the bailee," which, he says, "is either a delivery to one that exercises a public employment, or a delivery

¹ See *Coggs v. Bernard*, 2 *Ld. Raym.* 909.

² As is said by the court in *Boyce v. Anderson*, 2 *Pet.* 150.

³ *Ante*, § 3.

⁴ *Jones on Bailm.* 103. *Story on Bailm.* §§ 489, 490.

⁵ *Coggs v. Bernard*, 2 *Ld. Raym.* 909.

(a) The liability of the carrier is not affected by the fact that the property lost is insured. *Burnside v. Union Steamboat Co.* 10 *Rich.* 113.

(b) The owner of a toll-bridge is not a common carrier. *Grigsby v. Chappell*, 5 *Rich.* 443.

to a private person." Therefore, according to Lord Holt, to bring a person within the description of a common carrier, he must exercise the business of carrying as a "public employment," or, as it has been said, "he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, and not as a casual occupation *pro hac vice*."¹ (a)

§ 69. It was determined in the eighth year of the reign of Anne, that any person undertaking for hire to carry the goods of all persons indifferently is, as to the liability imposed, to be considered a common carrier. The case was trover for goods which had been put with the carrier's wagon into a barn and taken as a distress. The person to whom the goods had been intrusted carried cheese to London, and usually loaded back with goods for a reasonable price for all persons indifferently; and the court held, that "such an undertaking to carry for hire, as this privilege, was to be considered that of a common carrier, and the goods so delivered for that time under legal protection, and privileged from distress; and so wherever they are delivered to a person exercising any public trade or employment."² So of innkeepers. A person who

¹ Story on Bailm. § 495. *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story, C. C. 32. In North Carolina, to render a person liable as a common carrier, he must make the carriage of goods his constant employment, and one employed *pro hac vice*, though for hire, is not liable as a common carrier. *Anonymous v. Jackson*, 1 Hayw. 14. *Mershon v. Hobensack*, 3 Zab. 580. And see 2 Zab. 372; *York R. v. Crisp*, 14 C. B. 527, 25 Eng. L. & Eq. 396.

² *Gisbourn v. Hurst*, 1 Salk. 249. Evidence that the defendant kept a booking-office for a considerable num-

ber of coaches and wagons is not of itself sufficient to prove him a common carrier. Thus, where it was proved that at the door of a booking-office there was a board on which was painted, "conveyances to all parts of the world," and list of names of places, was held not sufficient proof that the owner of the office was a common carrier, so as to charge him for the loss of a box which was booked there. *Upston v. Slark*, 2 Car. & P. 598. *Gilbert v. Dale*, 1 Nev. & P. 22. A promise by a bookkeeper to make compensation for the loss of a parcel

(a) A person who holds himself out to the public to carry for hire is a common carrier as much in his first trip as in any subsequent one. *Fuller v. Bradley*, 25 Penn. State, 120. A railroad which occasionally carries goods on freight in passenger trains is not a common carrier of goods in such trains. *Elkins v. Boston & Maine R.* 3 Fost. 275. And the same rule applies to a railroad which occasionally carries passengers in its freight trains. *Murch v. Concord R.* 9 Fost. 9. See, generally, *Lawrenceburgh R. v. Montgomery*, 7 Ind. 474; *Pennewill v. Cullen*, 5 Harring. Del. 238.

only occasionally entertains travellers for pay is not an innkeeper within the meaning of the law, and if property is intrusted to his care by his guests, and it is lost, he is not responsible as a common innkeeper. Most of the farmers in the new states and territories in the West occasionally entertain travellers, without supposing themselves liable as common innkeepers for the horses or other property of their guests which may be stolen without any fault of their own. And it is held, in the new parts of the United States, that to be subject to the same responsibility attaching to innkeepers, a person must make tavern-keeping, to some extent, a regular business, and so hold himself out to the world.¹

§ 70. In *Dwight v. Brewster*, in Massachusetts,² Parker, C. J., in delivering the opinion of the court, defined a common carrier

is not binding upon the master, unless he be proved to be a general agent of the master for such purposes. *Olive v. Eames*, 2 Stark. 181. As will be more fully illustrated (*post*, § 75), the difference between a common carrier and warehouseman, in respect to liability, is the same as between a common carrier and a private carrier. Sometimes a person is both a common carrier and a warehouseman, and when the goods are safely deposited in his warehouse his liability as common carrier ceases, and he is only liable for ordinary negligence, as a private bailee for hire. In a late case, it appeared that four rolls of leather, the property of the plaintiff, were delivered to the defendants (Boston and Providence Railroad Corporation) at Providence, to be transported to Boston, one of which rolls of leather, on their being inquired for by the teamster of the plaintiff at the depot in Boston, was missing. It was the usage and practice of the defendants to deposit the goods they transported, until the owner should have a reasonable time to remove them, and therefore the court held that the defendants were not liable as common carriers for the loss of the roll of leather from the warehouse; but liable only as depositaries, or for want of ordinary

care. *Thomas v. Boston & Prov. R.*, 10 Met. 472.

¹ *Lyon v. Smith*, 1 Morris, Iowa, 184. The common law of England, as to the liability of innkeepers, is in force in Kentucky. *Kiston v. Hildebrand*, 9 B. Mon. 73. In *Dawson v. Chamney*, 5 Q. B. 164, it was held, that when chattels have been deposited with an innkeeper, the *primâ facie* presumption, when they are there lost or destroyed, is that the negligence of the innkeeper or his servants was the cause of the loss or damage. But this presumption may be rebutted; and if the jury find in favor of the innkeeper, as to negligence, he is entitled to succeed on a plea of "not guilty." Lord Denman, C. J., in delivering the judgment of the court in this case, observed: "Mr. Justice Story's comment and excellent treatise on Bailments was quoted as laying down a different rule; this does not appear to us to be so, if the whole passage is examined." The decision in this case was recognized by the Supreme Court of Vermont, *Merritt v. Claghorn*, 23 Vt. 177. And see *Overseers v. Warner*, 3 Hill, 150; and *post*, 133; *Sunbolf v. Alford*, 3 M. & W. 248.

² *Dwight v. Brewster*, 1 Pick. 50.

to be "one who undertakes for hire to transport the goods of such as choose to employ him, from place to place;" and this, he added, "might be carried on at the same time with other business." But in this country there is a discrepancy in the authorities as to the undertaking necessary to impose upon persons the responsibility of common carriers. Indeed, in this country it is considered reasonable, and to be well settled, that a person who undertakes, though it be only *pro hac vice*, to act as a common carrier, that is, to carry for hire without a special contract, thereby incurs the responsibility of a common carrier.¹ Both in Pennsylvania² and in Indiana,³ (a) it has been held that a wagoner who, upon his request, carries goods for hire, is a common carrier, whether the transportation be his principal and direct business, or an occasional and incidental employment; and the principal business of the carrier in both of the cases referred to was that of a farmer. In the case in Pennsylvania, Chief Justice Gibson, in giving the opinion of the court, said: "The defendant is a farmer, but has occasionally done jobs as a carrier. That, however, is immaterial. He applied for the transportation of these goods as a matter of business, and consequently on the usual conditions. His agency was not sought in consequence of a special confidence reposed in him. There was nothing special in the case; on the contrary, the employment was sought by himself, and there is nothing to show that it was given on terms of diminished responsibility. There was evidence of negligence before the jury; but, independent of that, we are of opinion that he is liable as an insurer." The above case of *Gisbourn v. Hurst* is thus commented on by the learned judge: "The best definition of a common carrier, in its application to the business of this country, is that given by Jeremy,⁴ which he has taken from *Gisbourn v. Hurst*, which was the case of one who was thought to be a common carrier only because he had for some small time before brought cheese to London, and took such goods as he could carry back into the country at a reasonable price. Mr. Justice Story has cited this case to prove that a common carrier is

¹ See Mr. Wallace's learned note to the case of *Coggs v. Bernard*, 1 Smith, Lead. Cas. (Am. ed. 1847), p. 220; *Moses v. Norris*, 4 N. H. 304.

² *Gordon v. Hutchinson*, 1 Watts & S. 285.

³ *Powers v. Davenport*, 7 Blackf.

497.

⁴ *Jeremy on Carr.* 4.

(a) So in Texas. *Chevallier v. Straham*, 2 Texas, 115.

one who holds himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation, *pro hac vice*.¹ The conclusion of Chief Justice Gibson was very different. He took it that a wagoner, who carries goods for hire, is a common carrier, whether transportation be his principal and direct business or an occasional and incidental employment. It was true that the court (in *Gisbourn v. Hurst*) went no further than to say, that a wagoner was a common carrier, as to the privilege of exemption from distress; but his contract was held not to be a private undertaking, as the court was at first inclined to consider it, but a public engagement, by reason of his readiness to carry for any one who would employ him, without regard to his other avocations, and he would consequently not only be entitled to the privileges, but be subject to the responsibilities, of a common carrier; indeed they are correlative, and there is no reason why he should not enjoy the one without being burdened with the other." In Pennsylvania, said Chief Justice Gibson, the wagoner was not always such by profession. No inconsiderable part of the transportation was done by the farmers in the interior, who took their produce to Philadelphia, and procured return loads for the retail merchants of the neighboring towns; and many of them passed by their homes with loads to Pittsburg or Wheeling, the principal towns of embarkation on the Ohio. But no one supposed they were not responsible as common carriers.²

§ 71. The rule approved and laid down in Tennessee is, that one who undertakes for reward to convey produce from one place upon the river to another becomes thereby liable as a common carrier.³ The same seems to be the doctrine in South Carolina.⁴ Where a person in that State employed a boat to take his own cotton, and occasionally carried that of his neighbors, it was held, that he was bound as a common carrier by the consent of his captain to take freight, though application for that purpose was usually made to himself. But if the defendant had previously employed his boat for his own purposes exclusively, it could not be fairly inferred that the agent could do what his employer never

¹ Story on Bailm. § 495. And see the case stated, *ante*, § 69.

² *Gordon v. Hutchinson*, *ub. sup.*

³ *Turney v. Wilson*, 7 Yerg. 340.
Craig v. Childress, Peck, 270.

⁴ *M'Clure v. Hammond*, 1 Bay, 99. *Elkins v. Boston R.* 3 Foster, 275.

had done ; but his employer had in some measure used the boat for the community in which he lived, and from his course of dealing with it had held himself out as a common carrier.¹ In a very late case in Georgia,² there is an elaborate opinion of the Supreme Court of Georgia, in which the court directly declare, that the rule as laid down in *Gordon v. Hutchinson*, in Pennsylvania, is opposed to the principles of the common law, and that it is wholly inexpedient. The decision in this case was, that a person who received and contracted to deliver certain packages of goods in good order and condition, unavoidable accidents only excepted, was not a common carrier, because it did not appear that carrying was his habitual business.³

§ 72. But although a person may incur the liability of a common carrier by receiving goods on his own application to carry them for hire from one place to another, as an occasional business, yet if a person is induced so to undertake by the particular request of his employer, he incurs only the liability of a private carrier ; and this, even when the person has once been a public carrier, and since abandoned the occupation. In *Satterlee v. Groat*,⁴ the defendant had been a public common carrier between Schenectady and Albany, previous to 1819, and in that year sold out all his teams but one, which he kept for agricultural purposes on his farm. Although it appeared in evidence that he employed his team in the carrying and forwarding business until 1822 or 1823, yet it did not so appear that subsequently he carried and forwarded a single load until April, 1824, when, upon an urgent application of one J. D., he despatched a driver with his team to bring some loads from Albany to Schenectady, with instructions to the driver to bring nothing for any other person ; and if the goods of J. D. were not ready, to come back empty. He brought two loads, and returned for a third under the same instructions ; but the third not being ready, instead of returning empty he applied to the plaintiff for a load, which was delivered to him to be carried to Frankfort, in Herkimer County. Arriving at Schenectady late at night, it was discovered the next morning that one of the boxes had been broken open and a part of the goods stolen. The defendant had disavowed all responsibility before it was discovered

¹ *M'Clure v. Richardson*, 1 Rice, 215.

² *Fish v. Chapman*, 2 Kelly, 349.

³ *Ibid.*

⁴ *Satterlee v. Groat*, 1 Wend. 272.

that any of the goods had been taken, and had declared that the driver had violated his express instructions in receiving them for carriage. The driver was subsequently convicted of stealing them and sent to the State prison therefor. The defendant gave immediate notice to the plaintiff of all the facts, and disavowed his responsibility for the loss. The court held, that the defendant stood upon the same footing as though he had never been engaged in the forwarding business, and that he was not responsible for the act of his servant done in the violation of his instructions, and not in the ordinary course of the business in which he was employed. The court put the case of a farmer's sending a servant with a load of wheat to market, and he, without any instructions from his master, applies to a merchant for a return load, and absconds with it, and then asks if the master could be responsible? Most clearly, they say, he would not be; for the reason, that it was beyond the scope of the general authority of the servant, *quoad hoc*. He acted for himself and on his own responsibility, and not for his employer. (a)

§ 73. The case of *Jenkins v. Pickett*, in Tennessee,¹ was not unlike the above. In this case a common carrier sent his wagon to N. with a load of cotton, the driver of which was a young negro, who had never been allowed to make contracts for hauling, and who had never been trusted before alone with the wagon and team, and who at this time was particularly instructed to bring home a load of salt, and not to receive goods for carriage; notwithstanding which he did receive goods for carriage, and the goods were damaged; it was held, that the carrier was not liable.

§ 74. There is not an entire coincidence in opinion, it has been said,² as to whether carmen, truckmen, and other porters, who undertake to carry goods for hire from one part of a town or city to another, as a common employment, are common carriers. (b) It seems to have been held in England, at *nisi prius*, by Lord Abinger, in *Brind v. Dale*, that a town carman, whose carts ply

¹ *Jenkins v. Pickett*, 9 Yerg. 480.

² Story on Bailm. note to § 496 (ed. 1846).

(a) See *Haynie v. Baylor*, 18 Texas, 498.

(b) A city express company engaged in carrying travellers' trunks from the passenger depots of the several railroads is a common carrier. *Richards v. Westcott*, 2 Bosw. 589. *Verner v. Sweitzer*, 32 Penn. State, 208.

for hire near the wharves, and who also lets the same out by the hour or day or job, is not a common carrier.¹ Story, in referring to this case, seems to be at a loss to perceive what substantial difference there is in the case of parties who ply for hire, for the carriage of goods of all parties indifferently, whether the goods are carried from one town to another or from one place to another within the same town; and that there is any substantial difference whether the parties have fixed termini of their business or not, if they hold themselves out as ready and willing to carry goods for any persons whatsoever, to or from any places in the same town, or in different towns.² Both this learned author and Kent lay it down, upon the strength of the general authorities, that truckmen, teamsters, and cartmen, who undertake to carry goods as a common employment, from one part of a town or city to another, are subject to the liabilities and duties as common carriers.³ In *Brind v. Dale*, it appears that the goods were put into the cart under a modified contract, that the plaintiff should go with them, and take care of them; and Lord Abinger, in summing up, told the jury, that if they thought that the goods were delivered under such modified contract, their verdict on that issue should be for the defendant; and the jury so found. In the case of *Robertson v. Kennedy*, in the court of Appeals of Kentucky, in 1834,⁴ it was decided expressly, that the defendant was liable as a common carrier for the loss of a hogshead of sugar which he had undertaken to convey from the bank of the river in the town to the store of the plaintiff in the same town, and, in giving their opinion, the court said, that "draymen, cartmen, and porters, who undertake to carry goods for hire, as a common employment, from one part of a town to another, come within the definition. So also does the driver of a slide (sled) with an ox team. The mode of transportation is immaterial." In a case where common carriers, from Gainesborough to Manchester, charged and received for the cartage of goods to the consignee's house at Manchester, from a warehouse there, where they usually unloaded, Lord Kenyon said: "In this case there is one peculiar circumstance, which makes it unnecessary to decide the general question, and

¹ *Brind v. Dale*, 8 Car. & P. 207.

⁴ *Robertson v. Kennedy*, 2 Dana,

² Story on Bailm. *ub. sup.*

430.

³ Story on Bailm. § 496; 2 Kent, Com. 598, 599.

that is the charge made by the defendants in one of their bills for the cartage at Manchester; for that charge the defendants undertook to deliver the goods;" and the defendants were held liable as common carriers from the warehouse in Manchester to the house of the consignee there.¹

§ 75. There is a class of persons well known in this country, who are called "forwarding merchants," and who usually combine in their business the double character of warehousemen and agents for a compensation, to forward goods to their destination. This class of persons is especially employed upon our canals and railroads, and in our coasting navigation by steam vessels and other packets.² (a) The law is, that persons so employed, if they have no concern in the vehicle by which the goods are sent, and have no interest in the freight, are not liable as common carriers, but are of course liable, like warehousemen and common agents, that is, for ordinary diligence, and for that only.³ (b) They are responsible only for want of good faith and reasonable and ordinary diligence; but one of their first duties, as consignees for transmission, undoubtedly is, to obey the instructions of the consignor, either express or fairly implied; and when they undertake

¹ *Hyde v. Trent Nav. Co.* 5 T. R. 389.

² 2 Kent, Com. 591, 592. Story on Bailm. § 444. See *post*, § 134.

³ *Platt v. Hibbard*, 7 Cow. 497. *Streeter v. Horlock*, 1 Bing. 34. *Brown v. Denison*, 2 Wend. 593. *Hyde v. Trent Nav. Co.* 5 T. R. 389. Story on Bailm. § 444. *Ackley v. Kellogg*, 8 Cow. 223. *Sage v. Gittner*, 11 Barb. 120. *Cowles v. Pointer*, 26

Missis. 253. Wharfingers and warehousemen are not liable for casual fire. *Sideways v. Todd*, 2 Stark. 400. And see, for distinction between the liability of a carrier without reward and one for reward, *Fay v. Steamer New World*, 1 Calif. 348; *Teall v. Sears*, 9 Barb. 317; *Goold v. Chapin*, 10 Barb. 612; *Cox v. O'Riley*, 4 Port. Ind. 368; *Moses v. Boston R.* 4 Fost. 71.

(a) If it is the general custom of a carrier to forward by sailing vessels all goods destined beyond the end of his line, he is not liable for not forwarding a particular article by a steam vessel, unless the direction to do so be clear and unambiguous. *Simkins v. Norwich Steamboat*, 11 Cush. 102.

(b) *Maybin v. S. Car. R.* 8 Rich. 240. *Denny v. New York R.* 13 Gray, 487. As to what is evidence of negligence, see *Nichols v. Smith*, 115 Mass. 332. The term "forward" may be used to include the carriage of goods; and although the contract uses the word "forward," the contractor may be held as a carrier. *Mercantile Ins. Co. v. Chase*, 1 E. D. Smith, 115. *Read v. Spaulding*, 5 Bosw. 395. *American Exp. Co. v. Pinckney*, 29 Ill. 392. *Simmons v. Law*, 8 Bosw. 213. See also § 76, n.

to vary from the instructions, from whatever motive, and a loss is thereby occasioned, they are clearly liable to the owners of the goods.¹(a) Sometimes a person is both a common carrier and a forwarding merchant, and receives goods into his warehouse to be forwarded in obedience to the future orders of the owner; and if, in such case, the goods are lost by fire before such orders are received, or the goods sent forward, he is not chargeable as common carrier, but only as warehouseman.(b) His duty as carrier ends also when the goods have arrived at the place of their fixed destination, and are deposited in the carrier's warehouse, when his duty as warehouseman again commences.² But if the deposit in the warehouse of the carrier be at some intermediate place in the course of his route; or if, after the arrival at the place of destination, he is still under obligation to deliver the goods to the owner; and before such delivery he has put them into his own warehouse, where they are consumed by fire, he will be liable for the loss, his duty as carrier not being ended.³(c)

§ 76. That wagoners and teamsters, who, as a public and common employment for hire, transport goods and merchandise from one town to another, are responsible as common carriers, has never been questioned.⁴ This mode of transportation has for a long period been extensively followed in Pennsylvania, and in that State it has ever been considered that the persons thus engaged in transportation are common carriers.⁵(d) It is, however, clear, that if peo-

¹ Forsythe v. Walker, 9 Barr, 148. Prov. R. 10 Met. 472; and *ante*, § 69, n. 2.

² Story on Bailm. § 449. Platt v. Hibbard, *ub. sup.*; Roskell v. Waterhouse, 2 Stark. 461. Roberts v. Turner, 12 Johns. 232. Webb, *in re*, 8 Taunt. 443. ⁴ 2 Kent, Com. 598, 599. Story on Bailm. § 496. Gisbourn v. Hurst, *ante*, § 70. Hyde v. Trent Nav. Co. *ub. sup.* Campbell v. Morse, Harper, 468. McHenry v. Railroad Co. 4

³ Forward v. Pittard, 1 T. R. 27. Hyde v. Trent Nav. Co. 5 T. R. 389. And see Thomas v. Boston & Harring. Del. 448. Powers v. Davenport, *ante*, § 70.

⁵ Lecky v. M'Dermott, 8 S. & R.

(a) Proctor v. Eastern R. 105 Mass. 512. Where goods were directed to be sent by a particular line of boats, and this line refused to take them, and the forwarder thereupon in good faith sent the goods by another line and they were lost, held that the forwarder was liable. Johnson v. New York Central R. 33 N. Y. 610, overruling S. C. 31 Barb. 196.

(b) See *post*, § 134.

(c) See *post*, § 134, n.

(d) The law is now well settled that express companies are common car-

ple be unwary enough to send parcels by the driver of a wagon for a hire paid to him, which is never to find its way into the pocket of the owner of the wagon, the owner is not liable in case the parcel is lost.¹ If money should be intrusted to a common wagoner, not authorized to receive it, by the ordinary business of his employers and owners, at their risk, they cannot be considered as liable for the loss thereof as common carriers, any more, it has been affirmed, than they would be for an injury done by his negligence to a passenger whom he had casually taken up on the road.²

§ 77. Next, as to coach-masters, or proprietors of stage-coaches, as common carriers. Persons who come within this description are liable as common carriers for the carriage of goods, provided they usually carry them for hire, and so hold themselves out to carry for all persons indifferently.³ In *Dwight v. Brewster*, it was expressly held, that an established practice of conveying for hire in a stage-coach parcels not belonging to passengers renders the proprietors liable as common carriers; (a) for, although the principal business is to carry passengers, there is no reason why the

500. *Gordon v. Hutchinson*, *ante*, § 70.

¹ Per Garrow, J., in summing up to the jury, in *Butler v. Basing*, 2 Car. & P. 613.

² Per Story, J., in *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story, C. C. 32.

³ *Jeremy on Carr.* 11. *Middleton v. Fowler*, 1 Salk. 282. *Story on Bailm.* § 500. 2 Bac. Abr. *Carriers*. *Allen v. Sewall*, 2 Wend. 327, and 6 Wend. 335. *Bean v. Sturtevant*, 8 N. H. 146. *Jones v. Voorhees*, 10 Ohio, 145. *Merwin v. Butler*, 17 Conn. 138.

riers. *Sherman v. Wells*, 28 Barb. 403. *Baldwin v. American Exp. Co.* 23 Ill. 197; 26 Ill. 504. *American Ins. Co. v. Pinckney*, 29 Ill. 392. *Haslam v. Adams Exp. Co.* 6 Bosw. 235. *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189. *Buckland v. Adams Exp. Co.* 97 Mass. 124. *Southern Exp. Co. v. Newby*, 36 Ga. 635. The same rule applies to transportation companies. *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 115. And to express freight lines. *Read v. Spaulding*, 5 Bosw. 395. The fact that the company calls itself a forwarder of goods makes no difference. "The name or style under which they assume to carry on their business is wholly immaterial. The real nature of their occupation, and of the legal duties and obligations which it imposes upon them, is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them." Per *Bigelow*, C. J., *Buckland v. Adams Exp. Co.* *supra*. See also *ante*, § 75, n.

(a) *Powell v. Mills*, 30 Missis. 231.

proprietors should not be common carriers of merchandise.¹ But the proprietors are not of course responsible as common carriers; they are so only when they have been in the practice of receiving and carrying for hire parcels or packages for persons not passengers in their coaches.² The authorities generally leave no doubt, that where a proprietor of a coach holds himself out to the public as only engaging for the personal conveyance of passengers; and refuses to allow his coach to be a conveyance for goods in general, the courts would consider him not a common carrier. If it has been the practice of a driver of one of their coaches to carry articles for hire for his own particular advantage, that fact alone will not render them liable.³ But if, on the other hand, the driver is to be paid a certain sum of money per month, and the compensation which shall be paid for carrying small packages, that will render the proprietors liable in case of loss; unless the owner of the packages knows the arrangement, and contracts with the driver solely on his own responsibility.⁴ The driver himself of a stage-coach generally employed by the proprietors, and who has been in the habit of carrying parcels of money for a small compensation, which was uniform, whatever might be the amount contained in any one package, is not subject, it has been held, to the responsibility of a common carrier, but only to that of ordinary negligence, or, in other words, to the responsibility only of a private carrier.⁵

§ 78. On the same principle that wagoners and the proprietors of stage-coaches are liable as common carriers, when they are accustomed to carry goods for all persons indifferently, the proprietors of railroad cars, which run between different places, and which are used for the purpose of so carrying, are liable in like manner, and the like reasoning applies.⁶ (a) In the case of

¹ *Dwight v. Brewster*, 1 Pick. 50.
² *McHenry v. Railroad Co.* 4 Harring. Del. 448.

³ *Beckman v. Shouse*, 5 Rawle, 179.

⁴ *Bean v. Sturtevant*, 8 N. H. 146.
Butler v. Basing, 2 Car. & P. 614.
Blanchard v. Isaacs, 3 Barb. 388. See *ante*, § 76.

⁵ *Bean, &c., ub. sup.*

⁶ *Shelden v. Robinson*, 7 N. H. 157. See *ante*, Chap. III.

⁷ *Parker v. Great Western R.* 7 Man. & G. 253. *Muschamp v. Lancaster R.* 8 M. & W. 421. *Palmer v. Grand Junction R.* 4 M. & W. 749. *Pickford v. Grand Junction R.* 12 M. &

(a) *Chicago R. v. Thompson*, 19 Ill. 578. See *Oxlad v. Northeastern R.* 9 C. B. (N. S.) 896. Receivers running a railroad under an appointment of a Court of Chancery are liable as common carriers. *Blumenthal v. Brainerd*,

Thomas *v.* Boston and Providence Railroad, Hubbard, J., in delivering the opinion of the court, observed in relation to the importance of railroad companies as common carriers as follows: "The introduction of railroads into the State has been followed by their construction over the great lines of travel of passengers and transportation of merchandise; and the proprietors of these novel and important modes of travel and transportation, which have received so much public favor, have become the carriers of great amounts of merchandise. They advertise for freight; they make known the terms of the carriage; they provide suitable vehicles, and select convenient places for receiving and delivering goods; and, as a legal consequence of such acts, they have become common carriers of merchandise, and are subject to the provisions of the common law which are applicable to carriers."¹ (a) A railroad company that transports cattle and

W. 766. Eagle *v.* White, 6 Whart. Dill *v.* S. Carolina R. 7 Rich. 158.
 505. Weed *v.* Saratoga R. 19 Wend. See *post*, § 540.
 534. Camden R. *v.* Burke, 13 Wend. ¹ Thomas *v.* Boston & Prov. R. 10
 611. Story on Bailm. § 500. Nash- Met. 472.
 ville R. *v.* Messino, 1 Sneed, 220.

38 Vt. 402. Paige *v.* Smith, 99 Mass. 395. Nichols *v.* Smith, 115 Mass. 332. Trustees of mortgage bonds of a railroad, who have the possession and control, and actually operate the road, are liable as common carriers. Sprague *v.* Smith, 29 Vt. 421. If one railroad transports a car for another railroad for hire, it is liable as a common carrier, although the car is on its own trucks. New Jersey R. *v.* Pennsylvania R. 3 Dutch. 100. Vermont & Massachusetts R. *v.* Fitchburg R. 14 Allen, 462. Nor is the liability of the carrier affected by the fact that the owner of the goods selects the car and loads it by his servants. Hannibal R. *v.* Swift, 12 Wall. 262. See also Mallory *v.* Tioga R. 39 Barb. 488. The owner of a car on a railroad belonging to the State is liable as a carrier for an injury sustained by a passenger, although the motive power of the road is furnished by the State, and though the accident happened through the negligence of the agents of the State. Peters *v.* Ryland, 20 Penn. State, 497. Contractors, building a railroad, who run a construction train and take a passenger for hire, are not liable as common carriers. Shoemaker *v.* Kingsbury, 12 Wall. 369.

(a) A railroad which is incorporated by the laws of one State cannot exempt itself from liability for the loss of goods delivered to it to be carried over part of its road to the State line, by previously leasing that part of its road to a corporation established by the laws of another State and connecting with it at the State line. Langley *v.* Boston R. 10 Gray, 103. The corporation to whom the road is leased may also be sued in such a case, although it is incorporated by the laws of another State, and it cannot dispute its liability

live-stock for hire, for such persons as choose to employ them, thereby assume and take upon themselves the relation of common carriers, and with the relation the duties and obligations which grow out of it; and they are none the less common carriers from the fact, that the transportation of cattle is not their principal business or employment.¹ (a)

§ 79. Though no substantial difference, says Sir William Jones, in speaking of common carriers, is assignable between carriage by land and carriage by water, or, in other words, between a wagon and a barge, yet it soon became necessary for the courts to declare, as they did in the reign of James I., that a common hoyman is responsible for goods committed to his custody, even if he be robbed of them; and that, therefore, the law which had been advanced concerning a land carrier may be applied to a barge-master or boatman.² (b) A later English writer on the law of

¹ *Kimball v. Rutland R.* 26 Vt. 247. See *post*, §§ 214, 394.

² *Jones on Bailm.* 107. He cites *Rich v. Kneeland*, Cro. Jac. 330, Hob. 30; "The first case of this kind," said Lord Holt, "to be found in the books," 12 Mod. 410. It was a case against a common bargeman, for loss

of property. Error was brought and assigned, that the action lay not against a common bargeman, without special promise; but all the justices and barons held, that case as well lies, as against a common carrier by land.

on the ground that the lease is void. *McCluer v. Manchester R.* 13 Gray, 124. See also *Feital v. Middlesex R.* 109 Mass. 398.

(a) If a railroad company for one rate of freight offers to carry cattle as common carriers, and for a lower rate offers to furnish cars and to let the owner of the cattle take charge of them, the company is not liable as a common carrier if the owner ships the cattle at the lower rate of freight. *Kimball v. Rutland R.* 26 Vt. 247.

(b) In *Liver Alkali Co. v. Johnson*, L. R. 7 Ex. 267, the defendant was a barge owner, and let out his vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between fixed termini, but the customer fixed in each particular case the points of arrival and departure. The plaintiff hired a barge, but did not name any particular one, to carry goods from a place on the Mersey to Liverpool. Held, that the defendant was a common carrier. Affirmed in Exch. Ch. L. R. 9 Ex. 338. In *Nugent v. Smith*, 1 C. P. D. 19, an action was brought against the secretary of a company which advertised and habitually ran a line of steamers from London to Aberdeen, to recover for the loss of a mare, delivered to the company without a bill of lading. The defendant contended that he was not liable as a common carrier, because

carriers says that hoymen, by the custom of the realm, are bound to keep and deliver goods safely, for their hire is due by custom,¹ and that an action lies equally against a common bargeman, without any special agreement, as against a carrier upon land.² In the case of the proprietors of the Trent Navigation Company *v.* Wood, it was declared by Lord Mansfield and the other judges of the King's Bench, that there is no distinction between a land and a water carrier.³

§ 80. The rule, as thus laid down in England, in respect to carriers by water, has been recognized and settled in this country.⁴ (a) In New York, says Kent, the English common law on the subject of the general responsibility of common carriers has been fully, explicitly, and repeatedly recognized in its full extent; and equally in respect to carriers by land and carriers by water.⁵

¹ Jeremy on Carr. 7. 1 Roll. Abr. on Carr. 52. 2 Kent, Com. 600. C. 2, 15. Story on Bailm. § 489.

² Jeremy on Carr. 9.

⁴ Story on Bailm. § 508.

³ Trent Nav. Co. *v.* Wood, 3 Esp. 127, and 4 Doug. 287, cited in Jeremy

⁵ 2 Kent, Com. 608.

he undertook to carry to a port without the realm; and, therefore, a part of the voyage was beyond the realm, and could not be subject to the custom of the realm. The judgment of the court (Brett and Denman, JJ.) was delivered by Mr. Justice Brett, who, after an elaborate review of the authorities, held the true rule to be: "That every ship-owner or master who carries goods on board his vessel for hire, is, in the absence of express stipulation to the contrary, subject, by implication, by the common law of England, adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God or the Queen's enemies. It is not only such ship-owners as have made themselves in all senses common carriers who are so liable; but all ship-owners who carry goods for hire, whether inland, coastwise, or abroad, outward or inward. They are all within the exception to the general law of bailments, which was adopted into the common law from the Roman law. The liability of the defendant, therefore, was that of an insurer, except against the act of God and the Queen's enemies; not because he was a common carrier, but because he carried the plaintiff's mare in his ship for hire." In the Court of Appeal, however, 1 C. P. D., 423, Cockburn, C. J., expressed his dissent from this view; and the case was decided on the ground that the defendant was a common carrier.

(a) If persons build or procure a flatboat, and hold themselves as ready to carry cotton for all who wish to send it, they are common carriers, although they intend to break up the boat and sell it for lumber at the end of the voyage. *Steele v. McTyler*, 31 Ala. 667.

It was understood and declared in *Elliott v. Rossell*, upon a full consideration of the subject, that a water carrier warranted the safe delivery of goods in all cases but the excepted cases of the act of God and public enemies.¹ The case of *Aymar v. Astor*,² it is true, would seem to unsettle the common-law rule as to carriers by water; but, if there was not some mistake in the report of that case, it was completely overruled by the case of *Allen v. Sewall*.³ Although this last case was reversed by the court of errors, it was upon a different ground, and the general doctrine as to the liability of common carriers by water was not disturbed;⁴ and were it so, it would be against prior and subsequent decisions in the same State. In Pennsylvania, although the English law as to the liability of common carriers by land is admitted, yet in *Gordon v. Little*,⁵ the law was considered with respect to carriers by inland navigation to be unsettled so far as it regarded its application in that State. The carrier on inland waters, it was held in that case, would be clearly liable for ordinary negligence; but beyond that point it was competent for the common carrier to prove a usage different from the common law. (a) It was, however, adjudged in *Harrington v. M'Shane*,⁶ that under the usage of trade on the Western waters (the river Ohio) the owners of steamboats, carrying goods on freight, were common carriers, and liable as such for all losses except those occasioned by the act of God, or the public enemy. Indeed, there is no doubt that the

¹ *Elliott v. Rossell*, 10 Johns. 1. So held, also, in *Colt v. M'Mechen*, 6 Johns. 160; *Schiefflin v. Harvey*, 6 Johns. 170; *Kemp v. Coughtry*, 11 Johns. 107; *Allen v. Sewall*, 2 Wend. 327; *M'Arthur v. Sears*, 21 Wend. 190. That the rule has been recognized in other States, see *Williams v. Grant*, 1 Conn. 487; *Clark v. Richards*, 1 Conn. 54; *Richards v. Gilbert*, 5 Day, 415; *Bell v. Reed*, 4 Binn. 127; *Hastings v. Pepper*, 11 Pick. 41; *Dwight v. Brewster*, 1 Pick. 50; *M'Clure v. Hammond*, 1 Bay, 99; *Miles v. Johnson*, 1 M'Cord, 157; *Cohen v. Hume*,

1 M'Cord, 439; *Murphy v. Stanton*, 3 Munf. 239; *Moses v. Norris*, 4 N. H. 304; *Craig v. Childress*, Peck, 270; *Gordon v. Buchanan*, 5 Yerg. 71; *Turney v. Wilson*, 7 Yerg. 340; *Faulkner v. Wright*, 1 Rice, 107; *Williams v. Branson*, 1 Murph. 417; *Jones v. Pitcher*, 3 Stew. & P. 135.

² *Aymar v. Astor*, 6 Cow. 266.

³ *Allen v. Sewall*, 2 Wend. 327.

⁴ 6 Wend. 335.

⁵ *Gordon v. Little*, 8 S. & R. 533.

⁶ *Harrington v. M'Shane*, 2 Watts, 443.

(a) This case is virtually overruled so far as it allows evidence of usage to contradict a rule of law. *Coxe v. Heisley*, 19 Penn. State, 243. Evidence of custom was held competent in *Steele v. McTyler*, 31 Ala. 667.

doctrine of the English common law, which declares, that persons carrying goods for hire, by water, are common carriers, and that they are liable for all losses happening otherwise than from the causes just mentioned, prevails generally in this country, as a part of the common law of the land.¹ The reasons which originated the responsibility of common carriers, the Supreme Court of Connecticut consider, apply with peculiar force, as it respects carriers by water; upon which element a spirit of dangerous adventure has grown up, which disregards the safety, not of property merely, but of human lives.² No custom among the freighters and owners of boats on a navigable river, it has been held in North Carolina, will excuse them from the operation of the law governing common carriers.³

§ 81. Therefore, canal boatmen, like other boatmen,⁴ carrying for the public for hire, are common carriers, and responsible as such.⁵ A captain of a canal-boat navigating Lake Champlain was held in Vermont to be liable as a common carrier.⁶ (a) It was held, that a boatman on the New York canals employed in the transportation of property, inasmuch as he was a common carrier, had no right to sell any article sent by him to market, without express authority from the owner; and that, if an article so sent by the boatman be purchased from him, the owner may recover it from the purchaser.⁷

§ 82. So also are ferrymen, if they hold themselves out to the

¹ So considered by Kent, 2 Kent, Com. 609; and by Story on Bailm. § 497.

² Crosby v. Fitch, 12 Conn. 419.

³ Adam v. Hay, 3 Murph. 149. Spivy v. Farmer, 1 Murph. 539. The owners of all river craft in Canada are responsible for losses occasioned by their own want of care or experience, and by that of their servants. Borne v. Perrault, Stuart, Lower Canada, 591, n.

⁴ Harrington v. Lyles, 2 Nott & M'C 88. Williams v. Branson, 1 Murph. 417. Smyrl v. Niolan, 2 Bailey, 421.

⁵ Humphreys v. Reed, 6 Whart. 435. De Mott v. Larraway, 14 Wend. 225. Parsons v. Hardy, 14 Wend. 215. Bowman v. Teall, 23 Wend. 306.

⁶ Spencer v. Daggett, 3 Vt. 92.

⁷ Arnold v. Halenbrake, 5 Wend. 33.

(a) See Beckwith v. Frisbie, 32 Vt. 559, where the owners of a canal-boat were under the circumstances of the case held to be private carriers. A company maintaining a canal for the use of the public on payment of tolls is bound to take only reasonable care that the canal may be navigated without danger. It is not a common carrier. Exchange Ins. Co. v. Delaware Canal Co. 10 Bosw. 180.

world as common carriers, which they usually do;¹ (a) although whether the owners of a ferry are bound either by express contract, or by a contract implied from usage, to receive carriages with their contents on board, and land them at the end of the transit across the river, is a question for the jury to determine.² The owners of a private ferry may so use it (although on a road not opened by public authority or repaired by public labor) as to subject themselves to the liability of common carriers; and they do so, if they notoriously undertake for hire to convey across the river all persons indifferently, with their carriages and goods.³ They are bound to prepare proper means for the embarkation and landing for the animals they carry, and although a horse be under the control and management of the owner, they are liable for injury to the animal in consequence of their culpable negligence in allowing an improper slip to be used.⁴ For articles not usually carried across the ferry, and to carry which is not within

¹ Story on Bailm. § 496. 2 Kent, Com. 599. Smith v. Seward, 3 Barr, 342. Pomeroy v. Donaldson, 5 Misso. 30. Cohen v. Hume, 1 M'Cord, 444. Gourdine v. Cook, 1 Nott & M'C. 19. Gardner v. Greene, 8 Ala. 96. Ruth-erford v. M'Gowen, 1 Nott & M'C. 17. Trent v. Cartersville Bridge, 11 Leigh, 521. Spivy v. Farmer, 1 Murph. 339. Fisher v. Clisbee, 12 Ill. 344. And see Law Rep. for May, 1851, p. 32, tit. "Action." White v. Winnissimmet Co. 7 Cush. 155. Willoughby v. Horridge, 12 C. B. 742, 16 Eng. L. & Eq. 437; and *post*, § 165.

² Walker v. Jackson, 10 M. & W.

161. It was held in this case, that to rebut evidence of usage to take on board and land the carriages of passengers, a notice stuck up at the door of entrance of foot passengers, but not visible to those who came with carriages, nor shown to have been known to the plaintiff, — that the defendant did not undertake to load or discharge horses or carriages, and would not be responsible for loss or damage done thereto, — was not admissible.

³ Littlejohn v. Jones, 2 M'Mullan, 365.

⁴ Willoughby v. Horridge, 12 C. B. 742; 16 Eng. L. & Eq. 437.

(a) Albright v. Penn, 14 Texas, 290. Powell v. Mills, 37 Missis. 691. Sanders v. Young, 1 Head, 219. Hall v. Renfro, 3 Met. Ky. 51. Whitmore v. Bowman, 4 Greene, Iowa, 148. Lewis v. Smith, 107 Mass. 334. Ferris v. Union Ferry Co. 36 N. Y. 312. Slimmer v. Merry, 23 Iowa, 90. If a ferryman permits a person to drive his own carriage aboard or off the boat, he constitutes him *quoad hoc* his agent. May v. Hanson, 5 Calif. 360. If a ferryman leases his boat to another ferry, he is not liable for an accident occurring while the boat is so used; nor is he liable for such an accident, in an action on the case for not maintaining a ferry. Claypool v. McAllister, 20 Ill. 504. A ferryman has the absolute right to direct what position each person shall take on the boat, without reference to priority of arrival. Claypool v. McAllister, 20 Ill. 504.

the ordinary employment of the owners of the ferry, the owners would not be liable for the loss of them; and more especially if the owners had no knowledge thereof, and the compensation was only for the personal emolument of the boatman.¹ But it by no means follows, that because the State, for the security of travellers, and as the price of the monopoly granted, exacts from the ferryman a bond with surety, and stipulates for the rates of ferryage, that the common-law liability, which attaches to the carriage of goods for hire, does not arise; and the bond and surety are an additional security afforded by the State, because of the public nature of the ferryman's employment. (a) Nor does the fact that the State regulates the rate of toll at all affect the question.² In England, a number of statutes have been passed, regulating the prices of the carriage of goods by common carriers,³ and it has never been supposed that the passage of these acts varied their liability as common carriers, which arises from the peculiar nature of their employment.

§ 83. The most common and the most important description of carriers by water at the present day, in this country, are the owners and masters of steamboats, which boats are, in almost all cases, engaged in the transportation of goods, as well as of persons, for hire, and are hence answerable for all goods generally shipped on board, unless for losses happening by the act of God or the public enemy.⁴ So it has been considered in England,⁵ and so expressly

¹ See opinion of Story, J., in *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story, 33; and *ante*, §§ 76, 77; and see *post*, § 84.

² *Babcock v. Beene*, 3 Ala. 392.

³ As may be seen enumerated in 1 Bac. Ab. 557. In Texas, a ferryman, who has not given a bond in conformity to the statute, is a common carrier. *Johnson v. Erskine*, 9 Texas, 1.

⁴ Story on Bailm. § 496. 2 Kent, Com. 599. *Jencks v. Coleman*, 2 Sumn. 221. *Patton v. Magrath*, Dudley, S. C. 159, is a strong case of the responsibility of the owners of steamboats, as common carriers. It

was held, by the Supreme Court of Florida, that where the declaration alleges that the defendant followed the occupation of master or owner of a steamboat plying on a navigable river, this is a sufficient averment to fix the character which the common law attaches to masters and owners of ships, steamboats, &c., so as to charge the defendant with a breach of the duty which alone results from that character, without an express averment, that defendant was a "common carrier." *Bennett v. Filyaw*, 1 Fla. 403.

⁵ *Siordet v. Hall*, 4 Bing. 607. *Gatliffe v. Bourne*, 5 Scott, 667; 4

(a) *Miller v. Pendleton*, 8 Gray, 547. This case also decides that a ferryman cannot give in evidence a custom on his and other similar ferries to put up a chain at the end of the boat, only when so requested.

held in this country in the States of New York,¹ Pennsylvania,² Connecticut,³ South Carolina,⁴ Alabama,⁵ Ohio,⁶ Illinois,⁷ and Tennessee.⁸

§ 84. But a steamboat may be employed solely in the transportation of passengers; then the liability is incurred only to the extent of the common rights, duties, and obligations of carrier vessels of passengers; or it may be solely employed in the transportation of goods and merchandise, and then, like other carriers of the like character, the owners are bound to the common duties, obligations, and liabilities of common carriers. Or, the employment may be limited to the mere carriage of particular kinds of property and goods; and when this is so, and the fact is known and avowed, the owners will not be liable as common carriers for any other goods or property intrusted to their agents without their consent.⁹

§ 85. The master of a steamboat, like a wagoner, or the driver of a stage-coach, carrying parcels for hire on his own account,¹⁰ cannot of course bind the owners as common carriers.¹¹

§ 86. Whenever steamboats are employed out of the course of

Bing. N. C. 314. *Muddle v. Stride*, 9 Car. & P. 380.

¹ *Allen v. Sewall*, 2 Wend. 327. *Bank of Orange v. Brown*, 3 Wend. 158. And that the owners of steamboats, railroads, &c., are held to be common carriers in New York, see *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, 19 Wend. 251, and the cases therein referred to by Justices Bronson and Cowen; *Powell v. Myers*, 26 Wend. 591; *M'Arthur v. Sears*, 21 Wend. 190.

² *Harrington v. M'Shane*, 2 Watts, 443. *Warden v. Greer*, 6 Watts, 424.

³ *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 539.

⁴ *Steamboat Co. v. Bason, Harper*, 262. The owners of a steamboat employed in carrying goods for hire between Charleston and Columbia were held to be common carriers. *Swindler v. Hilliard*, 2 Rich. 286. *Faulkner v. Wright*, 1 Rice, 107.

⁵ *Jones v. Pitcher*, 3 Stew. & P. 136.

Sprowl v. Kellar, 4 Stew. & P. 382. In the former case, the Supreme Court of Alabama held, that a charge in a declaration against joint owners of a steamboat, "that the defendants before and at the time of shipment were the owners and proprietors of the boat, and copartners in freighting; and which boat had been usually employed in conveying and transporting cotton, and other merchandise for hire," &c., was a sufficient averment of the character of the joint owners as common carriers, to authorize a recovery.

⁶ *Bowman v. Hilton*, 11 Ohio, 303.

⁷ *Dunseth v. Wade*, 2 Scam. 289.

⁸ *Porterfield v. Humphrey*, 8 Humph. 497.

⁹ *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story C. C. 16.

¹⁰ See *ante*, §§ 76, 77, 82.

¹¹ *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story C. C. 49. *Allen v. Sewall*, 2 Wend. 327.

their particular employment, as, for instance, in towing a freight vessel, they are bound to no more than ordinary care and skill in management; they are not then *quoad hoc* common carriers, and the law of common carriers is not applicable to them.¹ Where a steamboat company, whose regular employment was to transport passengers and merchandise, contracted for hire to take a vessel through the ice out of the harbor of Baltimore, and there was no express agreement that it should be responsible for all losses or injuries which might arise should the vessel not be carried through in safety, it was held, that the company was only bound to use reasonable efforts, care, and diligence, and was not bound to the extent of common carriers.² So far, indeed, from being common carriers, it is questionable whether they are carriers or bailees of any description, for the property towed is not delivered to them, nor placed within their exclusive control; but remains in the possession, and for most purposes in the exclusive care, of the owners or their servants.³ It was held, in *Alexander v. Greene*, that the owners of a steamboat undertaking for hire to tow a canal-boat and her cargo on the Hudson River, while the master and hands of the canal-boat remain on board, and in possession and charge of the property, are not common carriers, but ordinary bailees for hire; and as it was stipulated that the canal-boat was to be towed at the risk of her master, the owners of the steamboat were not responsible even for the want of ordinary care and skill.⁴ (a)

¹ *Caton v. Rumney*, 13 Wend. 387.

² *Penn. Nav. Co. v. Dandridge*, 8 Gill & J. 109.

³ Per Bronson, J., in *Wells v. Steam Navigation Co.* 2 Comst. 204.

⁴ *Alexander v. Greene*, 3 Hill, 1. Though common carriers cannot, in New York, contract for a restricted responsibility (see on this subject, *post*, Chap. VII.), yet other bailees for hire may so contract, and leave the whole risk, in cases free from gross negligence, on the owner of the

property. The owners of the steamboat, in this case, in the particular business in which they undertook to engage, were only ordinary bailees for hire, and therefore might contract for the restricted responsibility for which they did contract. In the case of *Wells v. Tucker*, in the New York Court of Appeals, it was held, that the owners of a steamboat employed in the business of towing boats for hire were not common carriers. *Wells v. Steam Navigation Co.* 2

(a) See *White v. Steamtug Mary Ann*, 6 Calif. 462; *Walston v. Myers*, 5 Jones, 174; *Ashmore v. Penn. Steam Towing Co.* 4 Dutch. 180; *Merrick v. Brainard*, 38 Barb. 574; *Hays v. Paul*, 51 Penn. State, 134; *The New Philadelphia*, 1 Black, 62; *Clapp v. Stanton*, 20 La. An. 495.

§ 87. The "subtlety of the human mind," observes Sir William Jones, "in finding distinctions, has no bounds; and it was imagined," he says, "by some, that whatever might be the obligation of a barge-master, there was no reason to be equally rigorous in regard to the master of a ship; who, if he carry goods for a profit, must indubitably answer for ordinary neglect of himself or his mariners, who ought not, they said, to be chargeable for the violence of robbers."¹ It was, however, otherwise decided, he informs us, in the great case of *Morse v. Slue*.² In this case, which was decided upon great consideration, it was held by the Court of King's Bench, in the reign of Charles II., that the master of a vessel employed to carry goods beyond sea, in consideration of the freight, was answerable as a common carrier. The circumstances of the case were, that eleven persons came on board of the ship in the river, under pretence of impressing seamen, and forcibly took the chests which the defendant had engaged to carry; and though the master was entirely blameless, yet Sir Matthew Hale and his brethren, having heard both civilians and common lawyers, and among them Mr. Holt for the plaintiff, determined on the principles which have been advanced in respect to the responsibility of common carriers, that the bailor ought to recover. This case, says Sir William Jones, was frequently afterwards mentioned by Lord Holt, who said, that the declaration was drawn by one of the greatest pleaders in England.³ It was subsequently declared by Lord Hardwicke, that the action lay equally against masters and owners of vessels;⁴ and in *Goff v. Clinkard*,⁵ the doctrine in the above cases was recognized. In the case of the Proprietors of the Trent Navigation Company *v. Wood*,⁶ the action was brought to recover damages of the defendants for goods undertaken by the

Comst. 204. By Bronson, J., in delivering the judgment of the court in this case: "It is true that the judgment, in *Alexander v. Greene*, was reversed by the Court of Errors (7 Hill, 533). But what particular point or principle of law was decided by the court, or what a majority of the members thought upon any particular question of law, no one can tell. It appears by the reporter's head-note that he could not tell." See *ante*, § 59.

¹ Jones on Bailm. 109.

² *Morse v. Slue*, 1 Vent. 190, 238; T. Raym. 220.

³ Jones *ub. sup.* who refers to *Coggs v. Bernard*, 2 Ld. Raym. 920.

⁴ *Boucher v. Lawson*, Cas. temp. Hardw. 183.

⁵ *Goff v. Clinkard*, cited in 1 Wils. 282.

⁶ *Trent Nav. Co. v. Wood*, 3 Esp. 127.

plaintiffs to be carried from Hull to Gainsborough, the vessel being sunk by striking against an anchor in the river, to which no buoy had been fixed to give notice of the danger; and it was held, "that there being no case which made any distinction between a land and a water carrier, and this injury arising from the negligence of a private man, if this sort of negligence were to excuse the carrier, wherever he finds an accident has happened to goods, from the misconduct of a third person, he would give himself no further trouble about the recovery of them; and although this might be a sea voyage, and it was usual to insure, the merchant is not bound to insure, nor does that vary the obligation."¹

§ 88. The doctrine of the English common law, which renders persons transporting goods for hire by water, for all persons indifferently, liable as common carriers, applies as well to external as to internal navigation, is the established doctrine in this country.² In Massachusetts it has been expressly declared, that a carrier by water by inland navigation is not only a common carrier, but one also who transports goods from port to port coastwise, or to or from foreign countries.³ In *Crosby v. Fitch*, in Connecticut,⁴ the court says, "that the defendants, as owners of this vessel (a sloop running between New York and Norwich, in Connecticut), were common carriers, and, as such, liable for all the responsibilities resulting from that employment, is well settled in the American courts; and in England it was never disputed as a principle of mercantile law." The doctrine has been extensively considered in New York, and it is in that State clearly understood to be, that masters and owners of vessels, who undertake to carry goods for hire, are liable as common carriers, whether the transportation be from port to port within the State, or beyond sea, at home or abroad, and they are answerable as well by the marine law as the common law, for all loss not arising from inevitable accident, or such as could not be foreseen or prevented; except so far as the exception is extended to perils of the sea by the special terms of the contract, contained in the charter-party or bill

¹ See also *Dale v. Hall*, 1 Wils. Williams v. Grant, 1 Conn. 487; 282. Crosby v. Fitch, 12 Conn. 410.

² 2 Kent, Com. 599, 600, 606, 608. Story on Bailm. §§ 497, 501. And ³ Per Shaw, C. J., in *Hastings v. Pepper*, 11 Pick. 41.

see *ante*, authorities referred to in ⁴ Crosby v. Fitch, *ub. sup.* §§ 79, 80; *Barber v. Brace*, 3 Conn. 9;

of lading.¹ There is, indeed, no doubt that such is the prevailing doctrine in the United States, as part of the common law of the land; the slightest neglect, *levissima culpa*, renders the master of a vessel liable.²

§ 89. But it is necessary that a ship, like a ferry-boat,³ or steam-boat,⁴ should have and retain her character and employment as a common carrier; and when it is said that the owners and masters of ships are treated as common carriers, it is to be understood of such ships as are employed for the transportation of merchandise for all persons indifferently.⁵ (a) Should the owner of a ship employ it on his own account, and, for the special accommodation of a particular individual, take goods on board for freight (not receiving them for all persons indifferently), he does not come within the definition of a common carrier, he not holding himself out as engaged in a public employment.⁶ (b) If the whole ship is chartered by the owner to a single person, for a particular voyage out and home, for a specified freight, under a charter-party, the charter-party will be held to regulate the rights, duties, and responsibilities of the parties, and supersede those of the ship-owner, as a common carrier.⁷

§ 90. Carriers by water being liable at common law to the same extent as carriers by land, and as their responsibility was more extensive and their risk greater, from the facilities for the commission of acts of fraud and violence upon the water, it was deemed in England a proper case for legislative interference to a

¹ *Elliott v. Rossell*, 10 Johns. 1. *Kemp v. Coughtry*, 11 Johns. 107. *M'Arthur v. Sears*, 21 Wend. 190.

² 2 Kent, Com. 609. With respect to the owners, although they do not in truth enter into the undertaking, they are yet liable, as well in respect of the freight received, as also for the appointing of the master, whom they may elect and control; but when charged in point of contract, as employers, they must all be joined. *Boson v. Sandford*, 2 Salk. 439; 3 Lev. 258; Carth. 62.

³ See *ante*, § 82.

⁴ See *ante*, §§ 84, 85.

⁵ Story on Bailm. § 501. Abbott on Shipp. Pt. 3, ch. 2. But see *ante*, modern definition of common carriers, § 70.

⁶ Story on Bailm. § 501.

⁷ 2 Kent, Com. 600. Story on Agency, §§ 452-461. *Ellis v. Turner*, 1 T. R. 531, cited in *Jeremy on Carr.* 48. *Cavenagh v. Such*, 1 Price, 328. *Williams v. Cranston*, 2 Stark. 82. *Hyde v. Trent Nav. Co.* 5 T. R. 397, cited in *Jeremy on Carr.* 64. *Boyce v. Chapman*, 2 Bing. N. C. 222.

(a) *Gage v. Tirrell*, 9 Allen, 299.

(b) *Lamb v. Parkman*, 1 Sprague, 343.

limited extent. The statutes of 7 Geo. II. ch. 15, and 26 Geo. III. ch. 159, exempted owners of vessels from responsibility as common carriers for losses by fire; and provided, further, that the owner should not be liable for the loss of gold, silver, diamonds, watches, jewels, or precious stones, by robbery or embezzlement, unless the shipper inserted in the bill of lading, or otherwise declared in writing to the master or owner of the vessel, the nature, quality, and value of the articles; nor should he be liable for embezzlement, or loss or damage to the goods arising from any act or neglect, without his fault or privity, beyond the value of the ship and freight; nor should part owners, in those cases, be liable beyond their respective shares in the ship and freight.¹ The statute 53 Geo. III. further limited the responsibility of ship-owners for damage done, without their fault, to other vessels or their cargoes, to the value of the ship doing the damage at the time of the accident.² In Massachusetts, the responsibility of owners was, by a statute passed in 1818, and re-enacted in the Revised Statutes of 1835,³ limited to the value of their interest in the ship and freight, in cases where they were liable for loss or damage occasioned by the acts of the master or mariners. (a) By

¹ *Wilson v. Dickson*, 2 B. & Ald. 2.

³ Part 1, tit. 12, ch. 32, §§ 1, 2.

² See 2 Kent, Com. 606.

(a) The acts limiting the liability of ship-owners in this country are: Massachusetts, St. of 1818, c. 122; Rev. Sts. c. 32; Gen. Sts. c. 52, §§ 18-21. Maine, St. of 1821, c. 14; Rev. Sts. 1840, c. 47; Rev. Sts. 1850, c. 35. United States, St. of 1851, c. 44; 9 U. S. Sts. at Large, 635. The U. S. Rev. Sts. §§ 4281-4289, are now in force. These sections are substantially the same as the St. of 1851; but, as they are to some extent different in language, and as the decisions hereinafter referred to have been made under the St. of 1851, it has been deemed best to cite, so far as necessary, the provisions of this statute, indicating the corresponding section of the Rev. Sts. in brackets. The St. of 1851 has been held not to be retrospective. *Kelley v. Kelso*, 5 Ohio State, 198. This statute is discussed at length in 1 Am. Law Rev. 597.

Section 1 of the St. of 1851 (Rev. Sts. § 4282) exempts owners of any ship or vessel from liability for loss "to any goods or merchandise whatsoever," by reason of "any fire happening to or on board the said ship or vessel," unless the fire is caused by the "design or neglect of such owner or owners." The section contains a proviso "That nothing in the act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners." This section does not apply where the cargo is destroyed by fire after it is taken from the vessel, and before it is delivered to the consignees. *Goddard v. Bark Tangier*, 21 Law Rep. 12. *Salmon Falls*

the statute of New York, of April 13, 1820, ch. 202, the conduct of canal-boats are under specific regulations, and freight-boats are

Co. v. Bark Tangier, 21 Law Rep. 6. The Ship Middlesex, 21 Law Rep. 14. The owner of a vessel is not liable for a loss caused solely by the design or neglect of the master or mariners. Walker v. Transportation Co. 3 Wall. 150. The section extends to passengers' baggage. Chamberlain v. Western T. Co. 44 N. Y. 305. A common carrier, who ships goods over part of his route on a vessel which he does not own or charter, is not "an owner" of the vessel within this section. Hill Manuf. Co. v. Boston & Lowell R. 104 Mass. 122. In Hill Manuf. Co. v. Providence & New York Steamship Co. 113 Mass. 495, it is held that a loss of goods by fire on a steamship, caused by the neglect of the corporation owning the vessel, is not a loss without the privity or knowledge of the owners of the vessel. The same case also holds that the jurisdiction of an action, in a State court, against the owners of a vessel, is not affected by subsequent proceedings by the owners in a federal court, under this statute. See also Knowlton v. Providence Steamship Co. 53 N. Y. 76. This case also holds, that, in case of loss by fire, the owners of the vessel are exempt altogether, or, if in fault, liable for the entire loss, and that the third section of the act does not apply. See, as to the proviso, Walker v. Transp. Co. 44 N. Y. 305. The Rev. Sts. § 4282, omits the *proviso*.

Section 2 of the St. of 1871 exempts the owners of a vessel from liability for precious metals and precious stones, coins, jewelry, bills of a bank or public body, unless a note in writing of the true character and value thereof is given and entered on the bill of lading. Wattson v. Marks, 2 Am. Law Reg. 161, holds, that if the bill of lading contains the necessary statement, and there is no imputation of fraud or mistake, a literal conformity to the provisions of the section is not necessary. See Pender v. Robbins, 6 Jones, 207. The section does not apply to money for travelling expenses in the baggage of a passenger. Dunlop v. International Steamboat Co. 98 Mass. 371.* This case was decided in 1867. The U. S. St. of 1871, c. 100, is much more comprehensive in its character, and is in substance the same as Rev. Sts. § 4281, which is as follows: "If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or time-pieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel or package or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such

bound to afford facilities to the passage of packet or passenger boats through the locks and on the canals, and the masters and

goods beyond the value and according to the character thereof so notified and entered." In *Brook v. Gale*, 14 Fla. 523, it was held that the articles, contained in the trunk of a passenger upon a steamboat are not the goods of a shipper of freight or baggage, within the St. of 1871. Under the 26 Geo. 3, c. 86, § 3, it has been held, that a description in the bill of lading of the property shipped as "1338 hard dollars," is a sufficient statement of the value, the dollar being a coin current at the port of shipment at the time, and that it is not necessary to state the value at the port of delivery. *Gibbs v. Potter*, 10 M. & W. 70. Under the Merchants' Shipping Act of 1854, which requires "the true nature and value of the article" to be stated, it is not a sufficient statement of value to describe a parcel of gold as "one box containing about two hundred and forty-eight ounces of gold dust," since gold dust varies in value. *Williams v. African Steamship Co.* 1 H. & N. 300.

Section 3 of the St. of 1851 (Rev. Sts. § 4283) is as follows: "That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss, or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel, and her freight then pending."

Section 4 of the St. of 1851 (Rev. Sts. § 4284) is as follows: "That if any such embezzlement, loss, or destruction shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight for the benefit of such claimants to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner or owners shall cease."

Many questions have been raised as to the construction of these two sections. It is now settled that the value of the vessel, after the loss, is to be taken, and that these sections apply to any case of collision, and are not confined to the case where there is a contract between the parties to the action,

owners are held responsible in damages for injuries resulting from any undue non-compliance with their duty.¹

¹ *Farnsworth v. Groot*, 6 Cow. 698. And see 2 Kent, Com. 606, note *b*.

as in the case of a shipper of goods injured by a collision. *Norwich Co. v. Wright*, 13 Wall. 104. It has also been held, that, if cargo is damaged by the unseaworthiness of the vessel, the owner of the vessel cannot abandon his interest in the vessel, because the law presumes that he is cognizant of this unseaworthiness, and therefore the loss is not "without his privity or knowledge." *In re Sinclair*, U. S. D. C., S. Car., 8 Am. Law Reg. 206. If the owner of the vessel is not owner of the freight, freight does not contribute to the loss. *Walker v. Boston Ins. Co.* 14 Gray, 288. "Freight pending" has been held to include the earnings of the vessel in carrying the goods of the owners of the vessel. *Allen v. Mackay*, 1 Sprague, 219. In *Swift v. Brownell*, 1 Holmes, 467, it was held, that in the case of a whaling vessel there was no "freight pending," and that the whaling outfits were not included in the term "ship" in the statute. In *Spring v. Haskell*, 14 Gray, 309, it was held that the part owners of a ship are jointly liable to the extent of the value of their interest in the ship and freight pending, for the embezzlement or loss of goods, and that the extent of their liability is not lessened by the ship being under mortgage.

Section 5 of the St. of 1851 (Rev. Sts. § 4286) is as follows: "That the charterer or charterers of any ship or vessel, in case he or they shall man, victual, and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof." In *Thorpe v. Hammond*, 12 Wall. 408, the owners of a vessel were sued jointly for a collision. One of them was the charterer. It was held, under this section, he was liable; and the court were equally divided on the question whether the other owners were liable.

Section 6 of the St. of 1851 (Rev. Sts. § 4287) is as follows: "That nothing in the preceding sections shall be construed to take away or effect the remedy to which any party may be entitled, against the master, officers, or mariners, for or on account of any embezzlement, injury, loss, or destruction of goods, wares, merchandise, or other property put on board any ship or vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or mariners, respectively; nor shall any thing herein contained lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of the ship or vessel." It was held, in *Wilson v. Dickson*, 2 B. & Ald. 2, under the St. 53 Geo. 3, c. 159, § 4, that, if a part owner is in command of the vessel, his negligence does not deprive the other part owners of the benefit of the statute.

Section 7 of the St. of 1851 (Rev. Sts. § 4289) provides that "This act shall not apply to the owners of any canal-boat, barge, or lighter, or to any

§ 91. In respect to the acts of agents, and persons in the employment of a carrier, the maxim *respondet superior* applies, and he is equally liable for their acts and for his own. In North Carolina, it has been held, that if a man's slave acts for him as a ferry-man, the master is considered a common carrier.¹ Any arrangement made between a carrier and his agent or servant, whereby the latter are to be paid for the carriage of particular parcels, will not exempt the carrier from responsibility for the loss of such parcels, unless such an arrangement is known to the owner thereof, so that he contracts exclusively with the servant or agent.² It has been already shown, that the mere fact that the driver of a stage-coach, or the master of a steamboat, is accustomed to carry packages of a particular description, especially for his own personal emolument, will not make the proprietors responsible therefor as common carriers.³ If the act upon which common carriers are sought to be charged be the act of an agent, his authority must be made out, and there arises a question of fact for the jury.⁴

§ 92. As an action lies against a principal for an injury done to another through the negligence or unskilfulness of his servants

¹ Spivy v. Farmer, 1 Murph. 339.

² Allen v. Sewall, 2 Wend. 327. Story on Bailm. 506. Citizens' Bank v. Nantucket Steamboat Co. 2 Story, 16. Bostwick v. Champion, 11 Wend. 571. Every person employed by one who is a common carrier, whether by the name of sub-contractor, servant, or otherwise, to perform any part of the work which the carrier has undertaken to perform; and every person employed by such person for that purpose, it has been held, is a "servant

in the employ of the carrier," with the 11 Geo. 4, and Will. 4, which renders common carriers liable for the felonious acts of servants in their employ. Machu v. London R. 2 Exch. 415.

³ Bean v. Sturtevant, 8 N. H. 146, cited *ante*, § 77. And see *ante*, § 85. For the doctrine of the liability of master for the acts and negligence of his agents and servants, see also *post*, §§ 572-582.

⁴ Thurman v. Wells, 18 Barb. 500. And see *post*, § 572 *et seq.* and § 638.

vessel of any description whatsoever, used in rivers or inland navigation. In Moore v. American Transp. Co. 24 How. 1, it was held that a vessel on Lake Erie, enrolled and licensed for the coasting trade, and engaged in navigation and commerce upon the lakes and navigable waters connecting the same, is not a vessel "used in inland navigation." So held, also, as to a vessel navigating Long Island Sound. Knowlton v. Providence Steamship Co. 33 N. Y. (Sup. Ct.) 370. So, as to a vessel running between Baltimore and Norfolk, although her owners belonged to an association with other companies, extending their business into the interior of the country. Headrick v. Virginia Railway, 48 Ga. 545.

while acting in his employment, so partners are responsible in the same way for the conduct of one of them as their servant in, for instance, driving against carriages, or running down ships. In these cases, if the carriage or the ship by which the damage is done is the joint property of the partners, it is unimportant whether it was under the guidance of one of the partners, or under the care and management of their servants, for *qui facit per alium facit per se*.¹ (a)

§ 93. It is not unusual for several persons to be engaged as partners in carrying goods by land, and by contract *inter se*, one of them is to find horses and drivers for a certain distance on the route, and the other for the remaining distance; and when such an arrangement is made, they are jointly responsible as partners throughout the entire route. And although all the partners may not have an interest in the vehicle, yet all will be held responsible as such, upon any contract made by their agent, for the carriage of any packet sent by either of the vehicles, and consequently for the loss of it.² In a case where A, the keeper of a coach-office, and part owner in several coaches, made a contract with B, for the carriage of parcels which he was in the habit of sending from that office to various places; it was held, that this bound the owners of all the coaches, in which A was a part owner, and as well those who became partners after the making of the contract, as those who were so before.³ Thus also where A, B, and C run a line of stage-coaches from Utica to Rochester, and

¹ *Bostwick v. Champion*, 11 Wend. 571, and the authorities there cited by Nelson, J.

² Story on Bailm. § 506. And see *Bostwick v. Champion*, *ub. sup.* Where the defendant and one Dyson were carriers from London to Gosport, and by an arrangement between them, Dyson horsed the wagon from London to Farnham, and the defendant then conducted to Gosport, and at the time the mischief complained of happened the wagon was drawn by Dyson's horses, and driven by a servant of his, who had been hired by and received wages from Dyson, and with whose

employment the defendant had no concern whatever, but the wagon itself was the property of the defendant; it was held that the defendant and Dyson were both jointly interested in the profits, and that, notwithstanding this private agreement, were jointly responsible to third persons for the negligence of their drivers throughout the whole distance. *Waland v. Elkins*, 1 Stark. 272. Since it was no objection, said the court, that Dyson was not joined, the case was the same as if the defendant received all the profits.

³ *Helsby v. Mears*, 5 B. & C. 504.

(a) *Mayall v. Boston R.* 19 N. H. 122.

the route was divided between into sections, the occupant of each section furnishing his own carriages and horses, hiring drivers, and paying the expenses of his own section; and the money received as the fare of passengers, deducting therefrom only the tolls paid at the turnpike gates, was divided among the parties in proportion to the number of miles run by each; and an injury was done to a third person through the negligence of the driver of the coach of A; it was held, that a joint action on the case at the suit of the party injured lay against B and C, as well as A.¹

§ 94. So likewise with shippers. Where an association was formed between shippers on Lake Ontario and the owners of canal-boats on the Erie Canal, for the transportation of goods and merchandise between the city of New York and the ports and places on Lake Ontario and the river St. Lawrence, and a contract was entered into by the agent of such association for the transportation of goods from the city of New York to Ogdensburg, on the river St. Lawrence, and the goods were lost on Lake Ontario; it was held, that all the defendants were liable for the loss, although some of them had no interest in the vessel navigating the lake.²(a)

§ 95. In the absence of any partnership connection between one route and another one united with it, persons receiving goods, as common carriers, continue to be responsible in that character until the goods are delivered at the place to which they are directed, even if the place to which they are directed is beyond the limits of the place to which they are accustomed to carry and deliver. A parcel was delivered at Lancaster, to the Lancaster and Preston Railway Company, directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the bookkeeper said it had better be paid by the

¹ Bostwick v. Champion, *ub. sup.* And see Weed v. Schenectady R. 19 Wend. 534.

² Fairchild v. Slocum, 19 Wend. 329. This is not like the case of Roberts v. Turner, 12 Johns. 232. There the defendant was a mere warehouse keeper and forwarder of goods;

and the course of business was for him to receive merchandise or produce at his store, and forward it by boatmen on the Mohawk River. He was not, therefore, a carrier, but an intermediate agent between the owner and the carrier.

(a) See Gill v. Manchester R. L. R. 8 Q. B. 186.

person to whom it was directed, on the receipt of it. The company were known to be the proprietors of the line only as far as Preston, where the railway unites with another line called the North Union line, and that afterwards with a third line, and so on into Derbyshire. The parcel having been lost after it had been forwarded from Preston, it was held, that the company were liable for the loss.¹ That a railroad company undertaking to carry passengers and their baggage beyond the limits of their own road are beyond doubt liable for losses which occur on any part of the route in respect to which the contract is made, was held, in the case of *The Schenectady and Saratoga Railroad Company*; who, having undertaken to carry from the Springs at Saratoga to Albany, they could not be allowed to say that they were carriers no farther than Schenectady, the termination of their own road.² (a) Common carriers employed in the transportation of goods on the Hudson River, between New York and Albany, if they receive a package directed to a place beyond Albany, and give an acceptance of it, without specially limiting their responsibility no farther than Albany, are held liable for the loss of the goods happening after their delivery at Albany. The box in question was directed to "J. Petrie, Little Falls, Herkimer Co.," and was delivered on board for the express purpose of transshipment to him, and was there received by the agent, who gave his receipt therefor. This, in effect, the court considered, was the agent's saying to the plaintiff that he would take and deliver it at the place of destination.³

¹ *Muschamp v. Lancaster R.* 8 M. & W. 421.

² *Weed v. Schenectady R.* 19 Wend. 534. The same doctrine is recognized by the Supreme Court of Florida. *Bennett v. Filyaw*, 1 Fla. 403.

³ *St. John v. Van Santvoord*, 25

Wend. 660. But this decision was overruled by the Court of Errors on the ground that the evidence was such that the carriers ceased to be such on the arrival of the goods at Albany, and that they became then mere forwarders of the goods. *Van Sant-*

(a) See also *Mytton v. Midland R.* 4 H. & N. 615; *Read v. Spaulding*, 5 Bosw. 395; *Coxon v. Great Western R.* 5 H. & N. 274; *Bristol R. v. Cummings*, 5 H. & N. 969; *Collins v. Bristol R.* 11 Exch. 790, 36 Eng. L. & Eq. 482; reversed in Exch. Ch. 1 H. & N. 517; *Noyes v. Rutland R.* 27 Vt. 110; *Hart v. Rensselaer R.* 4 Seld. 37; *Schroeder v. Hudson River R.* 5 Duer, 55; *Foy v. Troy R.* 24 Barb. 382; *Krender v. Woolcott*, 1 Hilton, 223; *Rome R. v. Sullivan*, 25 Ga. 228; *Williams v. Vanderbilt*, 29 Barb. 491; *Cary v. Cleveland R.* 29 Barb. 35; *Perkins v. Portland R.* 47 Maine, 573; *Burtis v. Buffalo R.* 24 N. Y. 269; *Cincinnati R. v. Spratt*, 2 Duvall, 4.

The ground is, that one company are the agents of the other,¹ and without any special contract between the parties, there is *prima facie* evidence of a contract to carry the goods to the place of destination according to the marks and directions on them.²

voord v. St. John, 6 Hill, 157. As to the distinction between carriers and forwarders, see *ante*, § 75; and *post*, § 281.

¹ Watson v. Ambergate R. Q. B. 1851, 3 Eng. L. & Eq. 497. Scothorn v. South Staffordshire R. 8 Exch. 341; 18 Eng. L. & Eq. 553. Crouch v. London R. 14 C. B. 255; 25 Eng. L. & Eq. 287. Goold v. Chapin, 10 Barb. 612. Fowles v. Great Western R. 7 Exch 699; 16 Eng. L. & Eq. 531. Richards v. London R. 7 C. B. 839. Johnson v. Midland R. 4 Exch. 367. Wilcox v. Parmelee, 3 Sandf. 610. Farmers' Bank v. Champlain

Tran. Co. 23 Vt. 209. Teall v. Sears, 9 Barb. 317. Parker v. Flagg, 27 Maine, 181. Sage v. Guttner, 11 Barb. 120. Hood v. New York R. 22 Conn. 1. And see American Law Register for April, 1856, p. 383.

² See the authorities just cited. But in Connecticut it has been held, that in an action against a railroad corporation to recover for the loss of goods directed to a place situated beyond the line of their road, the corporation was bound only for their delivery at the end of their own road. Waite, C. J., dissenting. Elmore v. Naugatuck R. 23 Conn. 457. (a)

(a) See also Naugatuck R. v. Waterbury Button Co. 24 Conn. 468; Converse v. Norwich T. Co. 33 Conn. 166. And in Massachusetts, the case of Muschamp v. Lancaster R. has not been followed. Nutting v. Connecticut River R. 1 Gray, 502. Lowell Wire Fence Co. v. Sargent, 8 Allen, 189. Pendergast v. Adams Express Co. 101 Mass. 120. Pratt v. Ogdensburg R. 102 Mass. 557. See also Detroit R. v. Farmers' Bank, 20 Wis. 122. And where an arrangement is made between several connecting railroad companies, by which goods to be carried over the whole route are to be delivered by each to the next succeeding company, and each company is to pay to the preceding company the amount already due for the carriage, and the last one is to collect the whole from the consignee, a reception of goods by the last company, and a payment by it of the charges of its predecessors, will not render it liable for an injury done to the goods before it received them. Darling v. Boston & Worcester R. 11 Allen, 295. Gass v. New York R. 99 Mass. 220. See South Carolina R. v. Bradford, 10 Rich. 307; Bradford v. South Carolina R. 10 Rich. 221; Kyle v. Laurens R. 10 Rich. 382; Dillon v. New York R. 1 Hilton, 231; Brintnall v. Saratoga R. 32 Vt. 665; Angle v. Mississippi R. 9 Iowa, 487. In Burroughs v. Norwich & Worcester R. 100 Mass. 26, the defendant was sought to be charged as a carrier beyond the line of its road on three grounds: 1. A promise to forward and deliver beyond its road; but as it appeared that the peculiar form of receipt in which was this promise was furnished by the plaintiff to the station-agent who signed it, and that the blanks furnished by the defendant to the station-agent were different, and as the defendant did not know that such receipts were given, it was held that the station-agent had no authority to bind the defendant by giving such receipts, although the defendant had carried goods for the plaintiff before on such receipts. 2. The

§ 96. The preceding cases are different from that of *Garside v. Trent and Mersey Navigation Company*, where the defendants undertook to carry goods from Stourport to Manchester, and to forward them from thence to Stockport; they were not held liable after the goods had been safely lodged at Manchester, because it

contract between the defendant and other roads; but as this contained the clause "loss or damage occasioned by injuries to person or property on said line shall be borne by the party having possession of the same at the time the injuries were done," it was held that this did not avail the plaintiff. And the same result was held to follow from the last ground. 3. That the freight tariff posted in the defendant's stations stated the entire rates of freight between different places, without regard to the proportion of work done by each road, as this contained a clause that "this line will not be responsible for collisions, damages, and accidents from steam, fire, sea, rivers," and the loss in this case was by an excepted peril. See *Washburn & Moen Manuf. Co. v. Providence & Worcester R.* 113 Mass. 490. In *Hill Manuf. Co. v. Boston & Lowell R.* 104 Mass. 122, the defendant was held to have made a contract rendering it liable as a carrier beyond its own road. See also *Railroad Co. v. Pratt*, 22 Wall. 123; *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594. And if the last carrier sues to recover the entire freight of goods over a continuous line of transportation, of which his route forms a part, the defendant cannot set off damage done to the goods on any part of the route. *Carson v. Harris*, 4 Greene, Iowa, 516. Unless the last carrier is the agent of the others, as in *Fitchburg R. v. Hanna*, 6 Gray, 539. The language of this last case seems to justify the theory that the mere act of suing for the entire freight makes him such an agent; but as the later Massachusetts cases hold that the carrier in paying the preceding carriers acts as the agent of the owner of the goods, it is difficult to see how the act of suing for his own compensation and for money paid for the use of the owner can make him the agent of the preceding carriers. And it is held that the fact of demanding the entire freight does not render the last carrier liable for damage done by a preceding carrier. *Wilson v. Harry*, 32 Penn. State, 270. *Hunt v. New York R.* 1 Hilton, 228. A usage that an intermediate carrier, who received goods subject to charges, may deduct from the freight earned by a preceding carrier the value of a deficiency between the amount delivered and that stated in the bill of lading, and that the preceding carrier shall not be allowed to show that a mistake occurred in stating the amount in the bill of lading, is invalid. *Strong v. Grand Trunk R.* 15 Mich. 206. If a carrier pays the freight to a preceding carrier according to the bill of lading, it is no defence to an action by him against the owner of the goods for the amount so paid that the first carrier did not deliver the amount called for by the bill of lading, unless there is a usage making it the duty of the second carrier to weigh the goods. *Naugatuck R. v. Beardsley Scythe Co.* 33 Conn. 218. A contract to carry beyond the terminus is not *ultra vires*. *Baltimore Steamboat Co. v. Brown*, 54 Penn. State, 77. *Railroad Co. v. Pratt*, 22 Wall. 123.

appeared that they were only common carriers as far as Manchester, and their obligation ceased as soon as they had deposited them there in safety. They then took charge of the goods merely as warehousemen, for the convenience of the plaintiff, to keep them till the Stockport carrier called for them.¹

§ 97. If common carriers then intend in any case to limit their responsibility in that character short of the place to which the goods are directed, they are bound in some way to indicate such intent.² (a) Otherwise, if such place was no more than one mile beyond the terminus of the carrier's established route, and the goods are lost on the other side of it, the owner of the goods is to find out somebody or other who is to be liable in respect of the carriage for that one mile. It was said in the English Court of Exchequer, by Lord Abinger, C. B., in the case above cited: "Particular circumstances might, no doubt, be adduced to rebut the inference which, *primâ facie*, must be made of the defendants having undertaken to carry the goods the whole way. The taking charge of the parcel is not put as conclusive evidence of the contract sued on by the plaintiff; it is only *primâ facie* evidence of it; and it is useful and reasonable for the benefit of the public that it should be so considered. It is better that those who undertake the carriage of parcels for their mutual benefit should arrange matters of this kind *inter se*, and should be taken each to have made the others their agents to carry forward."³

§ 98. Carriers who contract with the agent of the owner of goods for their transportation are of course none the less liable, as common carriers, to the owner. Thus, if a person who has established what is called an express line, for the conveyance of goods, money, &c., for all who will employ him, has a contract in his own name with a steamboat company for their conveyance, and delivers goods or money on board to be transported, and the goods or money are lost by negligence, the owner may sustain an action against the company; and it makes no difference whether

¹ *Garside v. Trent Nav. Co.* 4 T. R. 581. And see *Boehm v. Coombe*, *sup.*
² *Maule & S.* 172; *Thomas v. Boston*
³ *Muschamp v. Lancaster R.* 8 M. & P. 421.
ante, § 75.

(a) See *Butler v. Steamer Arrow*, 6 McLean, 470.

the name of the owner is disclosed by the agent to the company or not.¹

§ 99. **SECONDLY:** Since it appears that neither the element on which goods are carried, nor the nature, magnitude, and form of the carriage, make any difference, the question is, whether there is a diversity between one kind of goods and another. Persons undoubtedly may be common carriers of goods, although they are not precisely of the same kind and description that have before been carried by them for hire; unless, indeed, they be such that the person delivering them has good reason to suppose that they are not within the scope of the agent's authority to receive and transport. Thus, in our commercial cities, it is every day's practice for ship-masters and other agents to receive and transport new kinds of goods which were before unknown, and yet it was never, and never could reasonably be, questioned, that the ship-owner was equally liable, as if he had been personally present and had agreed to transport the new article. But the owner of a passage-boat carrying light freight might not be answerable for a cargo of coal or of marble, taken on board by the master, although he had been in the habit of carrying small pieces or specimens of either for hire. In the last case, the party who contracted with the agent would have good reason for presuming that the agent was acting contrary to the wishes of his principal; and if such were really the fact, the latter would probably not be held liable.² Where there is a meditated concealment of the nature and value of the goods delivered to the carrier (as by their being locked up in a chest), and they are of extraordinary value, and that fact is not communicated to the carrier, and, in consequence, the same care is not taken of the goods by the carrier as would otherwise have been, and they are lost, whether the carrier will be then exonerated will be considered in another place.

§ 100. The expression generally used is "a common carrier of goods," but a carrier of money may be as much bound as a common carrier of goods, if to carry it is the common usage of the

¹ *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344.

² See the opinion of Walworth, Chancellor, in *Sewall v. Allen*, 6 Wend. 346; *King v. Lenox*, 19 Johns. 235. To charge a person as common

carrier, it must be shown that the usage of his business includes the goods forwarded, or that there was a special contract to carry them. *Tunnel v. Pettijohn*, 2 Harring. Del. 48.

business in which he is engaged, and if it be his well-known practice to take charge of it for conveyance.¹ Thus, in the case of *Dwight v. Brewster*, in Massachusetts,² it is affirmed, that the proprietors of a stage-coach are liable where they act as common carriers, and the profit made by the carriage of bank-bills is within the scope of their business and for their account.

§ 101. In *Allen v. Sewall*, in New York,³ it was held that, on the principle of the responsibility of common carriers, owners of a steamboat carrying light freight and parcels for hire, as well as passengers, were answerable for the loss of a package of bank-bills delivered to the captain for carriage; and also that instructions to the captain of a vessel, employed in the carrying business, not to carry money, does not excuse the owners, unless notice of such instructions is brought home to the shipper. But this case was reversed on the ground that bills were not "goods, wares, and merchandise" within the meaning of the charter incorporating the steamboat company, whose agent the defendant was; and also on the ground that the carriage of such bills was not a part of their ordinary business, and was forbidden by instructions to the master.⁴ (a)

§ 102. In the case of the *Citizens' Bank v. The Nantucket Steamboat Company* (a suit in admiralty), the suit was in substance brought to recover from that company a sum of money in bank-bills and accounts belonging to that bank, which was intrusted by the cashier of the bank to the master of the steamboat, to be carried from the island of Nantucket to the port of New Bedford, which money had been lost, and never duly delivered by the master. The charter incorporating the company granted a

¹ Story on Bailm. § 495. *Kemp v. Coughtry*, 11 Johns. 109. *Sheldon v. Robinson*, 7 N. H. 157. *Emery v. Hersey*, 4 Greenl. 407. And see *Harrington v. M'Shane*, 2 Watts, 443; *Merwin v. Butler*, 17 Conn. 138; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; and *ante*, § 84.

² *Dwight v. Brewster*, 1 Pick. 50.

³ *Allen v. Sewall*, 2 Wend. 327.

⁴ 6 Wend. 335. "If I were com-

pelled," says Mr. Justice Story, "to choose between the relative authority of these decisions, upon the ground of the reasoning contained therein, I should certainly have deemed that of the Court of Errors the best founded in the principles of law." *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story, 49. Kent seems to entertain a like opinion. 2 Kent, Com. 698, n.

(a) *Chicago R. v. Thompson*, 19 Ill. 578. *Cincinnati Mail Co. v. Boal*, 15 Ind. 345.

right to run a steamboat "for the transportation of merchandise." It was held that the term "merchandise" does not apply to merely evidences of value, such as notes, bills, checks, policies of insurance, and bills of lading, but only to articles having an intrinsic value in bulk, weight, or measure, and which are bought and sold; and that in order to render the company liable it must be clearly proved that they had held themselves out to the public as common carriers of bank-bills for hire, and that they had authorized the master to contract on their account, and not on his own, for the carriage thereof. That the *onus probandi* was on the libellants to make out a *prima facie* case in the affirmative; and then the *onus probandi* of disproving this inference was shifted upon the respondents. That the knowledge of the owners that the master carried the money for hire would not affect them unless the hire was on their account, or unless the master held himself out as their agent in that business, within the scope of the usual employment and service of the steamboat.¹ (a)

¹ *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story, 16. In the case of *Sewall v. Allen*, in the Court of Errors of New York, it was held, it has been shown, that a steamboat charter, authorizing the company to transport "goods, wares, and merchandises," did not necessarily include the carriage of bank-bills; so that, unless the company actually made that as a part of their ordinary business of common carriers, they were not liable for any loss thereof. The judgment of Mr. Justice Story strongly inclined to the same conclusion. In the charter of the *Citizens' Bank* it appeared, in their suit against the *Steamboat Company*, the word "goods" is not found. If it were, said the learned judge, there might be more difficulty encountered in construing it; as it was, he had been unable to persuade himself that either the corporation or the legislature, under the word "merchandise," meant to include bank-bills, as an object of regular transportation for hire. It was incumbent, he said,

upon those who assert that the charter includes such an expanded meaning, to show, by some clear and determinate proofs, that the company have positively adopted and acted upon that meaning. The decree of the District Court, dismissing the libel with costs, was affirmed. The ground of defence of the company was, that, in point of fact, although the transportation of money and bank-bills by the master was well known by them, yet it constituted no part of their own business or employment; that they never, in fact, were common carriers of money and bank-bills; that they never held themselves out to the public as such, and never received any compensation therefor; that the master, in receiving and transporting money and bank-bills, acted as the mere private agent of the particular parties, and not as the agent of the company or by their authority. *Farmers' Bank v. Champlain Trans. Co.* 23 Vt. 186.

(a) *Hosea v. McCrory*, 12 Ala. 349. *Garey v. Meagher*, 33 Ala. 630.

§ 103. The general principles of law upon this subject cannot be too well understood, and they are well illustrated by Mr. Justice Story, in the case just above cited, as follows: "The transportation of passengers or of merchandise, or of both, does not necessarily imply that the owners hold themselves out as common carriers of money or bank-bills. It has never been imagined, I presume, that the owners of a ferry-boat, whose ordinary employment is merely to carry passengers and their luggage, would be liable for the loss of money intrusted for carriage to the boatmen or other servants of the owners, where the latter had no knowledge thereof, and received no compensation therefor. In like manner the owners of stage-coaches, whose ordinary employment is limited to the transportation of passengers and their luggage, would not be liable for parcels of goods or merchandise intrusted to the coachmen employed by them to be carried from one place to another on their route, where the owners receive no compensation therefor, and did not hold themselves out as common carriers of such parcels. *A fortiori*, they would not be liable for the carriage of parcels of money or bank-bills, under the like circumstances. So, if money should be intrusted to a common wagoner not authorized to receive it by the ordinary business of his employers and owners at their risk, I apprehend that they would not be liable for the loss thereof as common carriers, any more than they would be for an injury done by his negligence to a passenger whom he had casually taken up on the road. In all these cases the nature and extent of the employment or business which is authorized by the owners on their own account and at their own risk, and which either expressly or impliedly they hold themselves out as undertaking, furnishes the true limits of their rights, obligations, duties, and liabilities. The question, therefore, in all cases of this sort is, What are the true nature and extent of the employment and business in which the owners hold themselves out to the public as engaged? They may undertake to be common carriers of passengers, and of goods and merchandise, and of money; or they may limit their employment and business to the carriage of any one or more of these particular matters. Our steamboats are ordinarily employed, I believe, in the carriage, not merely of passengers, but of goods and merchandise, including specie, on freight; and in such cases the owners will incur the liabilities of common carriers as to all such matters within the scope of their employment and

business. But in respect to the carriage of bank-bills, perhaps very different usages, do, or at least may, prevail in different routes and different ports. But, at all events, I do not see how the court can judicially say that steamboat owners are either necessarily or ordinarily to be deemed in all cases common carriers, not only of passengers, but of goods and merchandise and money on the usual voyages and routes of their steamboats; but the nature and extent of the employment and business thereof must be established as a matter of fact by suitable proofs in each particular case. Such proofs have, therefore, been very properly resorted to upon the present occasion.¹(a)

§ 104. If by the usage of trade the carrier of the goods is to act as the agent for the sale of them at the port of destination, and to return the net proceeds to the shipper, it seems that when he receives the money arising from the sale, his liability as a common carrier reattaches, and he is answerable as a common carrier for the loss of the money; and on this subject the principles advanced in the preceding section may be applicable. In *Kemp v. Coughtry*,² the master of a coasting vessel was employed to carry goods from Albany to New York, and the usual course of trade was for the master to sell the goods at New York, without charging any thing more than the ordinary freight, and to account to the owner of the goods for the proceeds, and not to the owner of the vessel. The master, after receiving the goods, carried them to New York, and sold them there, and brought the money, the proceeds of the sale, on board, and put it in his trunk. The cabin, though locked

¹ *Kirkland v. Montgomery*, 1 Swan, 19 Barb. 346. *Farmers' Bank* 452. *Chouteau v. Steamboat St. Anthony*, 11 Misso. 226. *Russell v. Livingston*, 19 Barb. 346. *Farmers' Bank* 452. *Chouteau v. Steamboat St. Anthony*, 20 Misso. 519. *Knox v. Rives*, 14 Ala. 249. In Louisiana a steamboat is liable for money deposited by travellers, when the deposit is a necessary one. *Dunn v. Branner*, 13 La. Ann. 452. In *Haynie v. Waring*, 29 Ala. 263, it was argued that, inasmuch as an act of Congress made it the duty of the master or manager of a steamboat to deliver to the postmaster of a place all letters delivered to the steamboat and addressed to such place, and entitled the carrier to receive two cents for each letter from the postmaster (St. 1825, c. 64, § 6, 4 U. S. Sts. at Large, 104), this made the steamboat a common carrier of a letter, containing money, and carried gratuitously; but the court held that the act of Congress had no effect on the contract between the carrier and a third person.

(a) *Whitmore v. Steamboat Caroline*, 20 Misso. 513. *Chouteau v. Steamboat St. Anthony*, 20 Misso. 519. *Knox v. Rives*, 14 Ala. 249. In Louisiana a steamboat is liable for money deposited by travellers, when the deposit is a necessary one. *Dunn v. Branner*, 13 La. Ann. 452. In *Haynie v. Waring*, 29 Ala. 263, it was argued that, inasmuch as an act of Congress made it the duty of the master or manager of a steamboat to deliver to the postmaster of a place all letters delivered to the steamboat and addressed to such place, and entitled the carrier to receive two cents for each letter from the postmaster (St. 1825, c. 64, § 6, 4 U. S. Sts. at Large, 104), this made the steamboat a common carrier of a letter, containing money, and carried gratuitously; but the court held that the act of Congress had no effect on the contract between the carrier and a third person.

in the absence of the master and crew, was broken open, and the money stolen. The court held, upon this state of facts, that the owners were responsible for the loss, and treated the case as one arising against them in the character of common carriers. The view taken by the court was, that the money, when on board, was to be considered the same as a return cargo purchased with the proceeds of the goods.¹

§ 105. In *Emery v. Hersey*, in Maine, it appeared that the defendant's sloop was employed in carrying wood and lumber on freight from the river Saco; and that the plaintiff shipped on board of the sloop, on freight, a certain quantity of lumber to be sold by the master, and the net proceeds to be paid over to the plaintiff. It appeared, also, by the testimony, that the usage at Saco was, when lumber is shipped on freight, for the master to sell it, and bring home the money and pay it over to the shipper. It was held that where, in the usual course of business, goods shipped on freight are consigned to the master for sales and returns, the owner of the vessel is liable as well for the payment of the proceeds to the shipper as for the safe transportation of the goods; and the court referred to the decision in the case of *Kemp*

¹ Upon the decision in this case, Story, in his work on Bailments, has thus commented: "Upon the actual posture of the facts in this case, the very question was, whether the very specific money on board was to be treated as cargo, or was to be carried back for hire; and whether the master was bound to carry back the specific money received by him, or was only bound to pay over and account to the shipper for the amount and value of the proceeds in any money whatsoever. Now, it is certainly no part of the duty of a common carrier to sell goods and to account for the proceeds. If he sells, it is not as a carrier, but as a factor. The owners of the vessel may be liable for his acts as factors, if the course of trade makes him their agent in the business of selling. But, when there is a right delivery of the goods at the place of destination, the duty of the carrier, as such, would

seem to cease, and the duty of factor to commence. If the specific money received, or any other goods bought with it, are to be returned in the same vessel to the original port, and the freight paid contemplates that course of trade, as soon as the goods or money are put on board for the purpose of the return carriage, the liability of the carrier certainly reattaches. But the evidence in the case went to show, not that there was to be any such return of the particular money or goods in the vessel, but merely, that there was a liability of the master to account for the proceeds to the owners of the goods, and not to the owner of the vessel. Perhaps the application of the law to the facts, rather than the law itself, as laid down in the case, would deserve further consideration." See *Allen v. Sewall*, 2 Wend. 227, 6 Wend. 363.

v. Coughtry as an authority directly in point.¹ This case, with the preceding one, was considered in the case of *Harrington v. M'Shane*, in the Supreme Court of Pennsylvania; and it was held in this case that, where the owners of a steamboat took produce for a certain freight, to be carried from Pittsburg to Louisville, and to be sold by them, and were bringing back in the same vessel the money which they obtained on the sale of the produce, when the vessel and money were accidentally consumed by fire, the owners, under the usage of trade on the Western waters, were acting as common carriers in going as factors in selling the produce, and as common carriers in bringing back the money; and that they were liable for the loss of the money, notwithstanding the accident.²

§ 106. But the usage in such cases, like all commercial usages, must be clearly proved. The captain of a steamboat, who was part owner, took flour on freight, and undertook to sell it; and after selling it, failed to account for the proceeds to the freighter; and the owners, it was held, were not bound by his contract, in the absence of proof, that he had express authority from them, or implied authority from the usage of trade, to act as factor, and the court refer to the decision in the case of *Kemp v. Coughtry*, in New York, as being founded on the usage of trade between New York and Albany.³ If a common carrier, by whom goods are sent to A, sells them to B, such sale vests no title; and, to take a case out of the operation of this principle, on the ground of the usage of trade, the usage must be well established, certain, uniform, and reasonable. But if the owner of a horse send it to a repository of sale, it must be intended as an implied authority to sell it; or, if one sends goods to an auction-room, it cannot be supposed that he sent them there merely for safe custody. So the principle is not denied, that if a person sends by a carrier merchandise or produce to a place where it clearly appears to be the ordinary business of the carrier to sell, it must be intended that the commodity was sent thither for the purpose of sale.

§ 107. It has been a matter of considerable discussion, whether the usual baggage taken with them by persons in travelling in stage-coaches, rail-cars, steamboats, &c., are to be regarded as in

¹ *Emery v. Hersey*, 4 Greenl. 407.

² *Taylor v. Wells*, 3 Watts, 65.

³ *Harrington v. M'Shane*, 2 Watts, 443.

the custody of the proprietors of those conveyances in the character of common carriers. (a) It has ever been agreed on all hands that the proprietors do not warrant, in that character, the safety of the persons of the passengers, though, as will be shown in a separate chapter, they are responsible for due care in respect to that. That the proprietors were not responsible as common carriers for the baggage of the passengers, unless a distinct price was paid for it, was twice held by Lord Holt; and he considered it not usual to charge for baggage, unless it exceeded a certain amount in weight or quantity.¹ But, inasmuch as the custody of the baggage is an accessory to the principal contract,² it is considered that coach proprietors, &c., should be placed in respect to baggage upon the ordinary footing of common carriers. (b)

§ 108. So the law is now considered to be in England.³ (c) Thus, in a modern case, in an action against a coach proprietor, to recover damages for the loss of a trunk, the plaintiff, it appeared, being about to travel from Bath to Truro, took a place at the defendant's coach-office. At Taunton, when the coach was changed for the convenience of the proprietor, the plaintiff was assured by the coachman that the trunk had been safely stowed on the top of the coach, the second vehicle being deficient in the

¹ *Middleton v. Fowler*, 1 Salk. 282. *Upshare v. Aidae*, 1 Comyns, 25. And see *Jeremy on Carr.* 11, 13.

² It is said, in the civil law, that, by a delivery of the principal thing, that which is accessorial does not pass; as if a slave, with his clothing on, is deposited; or a horse with his halter; neither the clothes nor the halter are deposited. But this doctrine, if true at all in our law, must be received with many qualifications. It must always depend upon the intent of the parties. *Story on Bailm.* § 54. According to

this rule, the contract to carry the baggage of a passenger by usually receiving baggage, subjects the proprietor to the responsibility of a common carrier of goods in general; as it is at least as much intended by the passenger, that his trunk containing his necessary baggage should be safely transported, as it is intended by the shipper of a barrel of flour that that should be.

³ 1 Bell, Com. 467, 468. *Great Western R. v. Goodman*, 12 C. B. 313; 11 Eng. L. & Eq. 546.

(a) As to what will amount to a delivery of baggage to a carrier, see *post*, §§ 131, 146 a.

(b) As to the liability of street railways, see *Levi v. Lynn R.* 11 Allen, 300. Where there are connecting lines of railroads, and baggage is lost, it must be shown that the one sought to be charged has either received the baggage or has contracted in some way to transport it. *Michigan R. v. Meyres*, 21 Ill. 627. See also *Penn. R. v. Schwarzenberger*, 45 Penn. State, 208.

(c) See *Munster v. Southeastern R.* 4 C. B. (N. S.) 676.

accommodation of a boot, which the first afforded. On arrival at the place of destination the plaintiff missed his trunk, which contained apparel and jewels; and it was held, that the defendant was liable to make compensation to the owner, though no disclosure was made of the value of the contents of the trunk, and though there was a notice in the defendant's office limiting his responsibility to five pounds, in the absence of such disclosure; which notice the owner of the trunk, having been in the office, had an opportunity of seeing.¹

§ 109. In *Peixotti v. M'Laughlin*, in the Court of Appeals of South Carolina, in 1847,² in which it was held, that a stage contractor is a common carrier, and liable as such for all loss of baggage, Richardson, J., who delivered the opinion of the court, observed: "The strict liability of common carriers by the common law has been fully recognized in this State in many cases, and the general doctrine is established. The liability of ferrymen as common carriers, so often adjudged, is very analogous to the present case. The ferryman takes over a man, say for ten cents; but if the man carries a pack, there can be no doubt the ferryman would be liable for the loss of the pack, although he takes no toll separately for the pack. So, if the contents of a wagon or of the load upon a horse be lost; because all must be necessarily placed in the custody of the ferrymen. The stage contractor, the ferryman, the boatman, railroad companies, and wagoners are alike carriers over the public highway, and stand all in the same parity of reasoning, *i.e.* they come within the same necessary and strict legal policy of guarding against robberies or cheats by those who, having the custody, are enabled to do wrong secretly."

§ 110. It was formerly held, say the Supreme Court of New York, that the owner of the vehicle or boat was not answerable as a carrier for the luggage of the passenger unless a distinct price was paid for it; but it is now held, that the carrying of the baggage is included in the principal contract in relation to the passenger; and the carrier is answerable for the loss of the property, although there was no separate agreement concerning it. A con-

¹ *Brooke v. Pickwick*, 4 Bing. 218. As to the effect of notices in limiting carriers' responsibility, it will be fully considered, *post*, Chap. VII. See *Cairns v. Robins*, 8 M. & W. 258.

² *Peixotti v. M'Laughlin*, 1 Strob. 468. And see *Dill v. South Carolina* R. 7 Rich. 158.

tract to carry the ordinary baggage of the passenger is implied from the usual course of the business; and the price paid for fare is considered as including a compensation for carrying the freight.¹ The practice of requiring freight for baggage if over a certain weight, well illustrates that baggage under that weight is fully paid for by the personal passage-money of the traveller.² It was affirmed by Chancellor Walworth, in *Powell v. Myers*, in the Court of Errors of New York,³ that the salutary rule of holding the owners of steamboats, railroads, canal-boats, stage-coaches, &c., liable for losses other than those arising from public enemies or inevitable accidents, and which is so essential to the preservation of the baggage of the otherwise unprotected traveller against the negligence of the carriers, or the frauds of their servants, should not be impaired by any decision of that court; and the opinion of the Court of Errors was, that such owners were liable as common carriers for the safety of baggage until its delivery to the owner. The doctrine as laid down with great rigor in Ohio, in which State it has been held, that the proprietors of stage-coaches are common carriers, and that their liabilities cannot be limited even by actual notice to a traveller that his baggage is at his own risk.⁴ In Pennsylvania, in a suit against stage owners for loss of baggage, it was held, that payment of the fare need not be expressly proved; for it may be inferred without violent implication, inasmuch as the payment of fare is seldom or ever neglected. But even if the fare is not paid, the passenger is liable to pay it; and this obliges the owners of a stage-coach to the exercise of diligence.⁵ (a)

¹ *Hawkins v. Hoffman*, 6 Hill, 586. *Bennett v. Dutton*, 10 N. H. 481. *Logan v. Ponchartrain* R. 11 Rob. La. 24.

² *Peixotti v. McLaughlin*, 1 Strob. 468.

³ *Powell v. Myers*, 26 Wend. 591. See also *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, 19 Wend. 251, and the cases therein referred to by

Justices Bronson and Cowen; *Orange County Bank v. Brown*, 21 Wend. 254; *Camden R. v. Burke*, 13 Wend. 611.

⁴ *Jones v. Voorhees*, 6 Ohio, 358.

⁵ *McGill v. Rowland*, 3 Barr, 451.

And see also *Bingham v. Rogers*, 6 Watts & S. 495; *Whitesell v. Crane*, 8 Watts & S. 369.

(a) If the baggage of a passenger is left behind through no fault on the part of the carrier, and is subsequently delivered to the carrier and lost by him, an instruction to the jury, in an action against the carrier, that the price paid by the passenger is a sufficient consideration for the agreement to carry, is erroneous. *Wilson v. Grand Trunk* R. 56 Me. 60.

§ 111. The fact that stage contractors, &c., do not enter the baggage upon the way-bill does not alter their liability as common carriers for the loss of such baggage, as the way-bill is altogether *ex parte*, and is not, like a bill of lading, a contract.¹ (a)

§ 112. Although hackney-coachmen are not deemed common carriers of goods or merchandise, their employment being more for the conveyance of passengers than for the carriage of goods,² yet, as to the baggage of the passengers they carry, and hold themselves out to carry with their baggage, there is as much reason that they should be responsible in the character of common carriers, in respect to such baggage, as the owners of stage-coaches, &c. It is ordinarily the case, that hackney-coachmen are accustomed to carry the baggage of passengers, although they receive no specific compensation therefor, but simply receive the fare for the transportation of the traveller; yet, like common carriers, they are responsible for the safety of such baggage; since it constitutes a part of the service for which the fare is paid, and the passengers are thereby induced to travel in the coach, and the custody of the baggage may be deemed, as in the case of an innkeeper, an accessory to the principal contract.³ Still it is a question of fact, whether a hackney-coachman or a cabman professes to carry both passengers and baggage; and if it so appear, he is clothed with the obligations and responsibilities of a common carrier of goods for hire.⁴ (b)

§ 113. Coach proprietors, &c., are held liable as common carriers for the baggage of passengers, even if the owner of the baggage is present, or sends his servant to look after the baggage; unless there be fraud on the part of the owner. In *Robinson v. Dunmore*, Chambre, J., said: "It has been determined, that if a

¹ *Peixotti v. McLaughlin*, 1 Strob. 468.

³ Story on Bailm. § 498.

² *Jeremy on Carr.* 13, 14. *Upshare v. Aidee*, 1 Comyns, 25. *Acton v. Heaven*, 2 Esp. 533.

⁴ *Ross v. Hill*, 2 C. B. 877; 3 Dowl.

& L. 788. *Dickinson v. Winchester*, 4 Cush. 114. And see *Commonwealth v. Fahey*, 5 Cush. 408.

(a) The owners of a ship may contract with a passenger not to be liable unless a bill of lading is given for the baggage. *Wilton v. Atlantic Nav. Co.* 10 C. B. (N. S.) 453.

(b) See *Case v. Storey*, L. R. 4 Ex. 319. An omnibus proprietor is liable as a common carrier for the baggage of a passenger. *Dibble v. Brown*, 12 Ga. 217. *Parmelee v. McNulty*, 19 Ill. 556.

man travel in a stage-coach, and take his portmanteau with him, though he has an eye on the portmanteau, yet the carrier is not absolved from his responsibility.¹ But the law is equally rigid, that the baggage should be fairly in the custody of the carrier; for where an action was brought against a railroad company for the loss of an overcoat belonging to a passenger, and it appeared that the coat was not delivered to the defendants, but that the passenger, having placed it on the seat of the car in which he sat, forgot to take it with him when he left, and that it was afterwards stolen, the defendants were not held liable.² (a) A ferryman

¹ *Robinson v. Dunmore*, 2 Bos. & 2 *Tower v. Utica R.* 7 Hill, 47. P. 416. And see *Cole v. Goodwin*, And see *post*, § 140; and *Richards v.* 19 Wend. 251. *London R.* 7 C. B. 839.

(a) In *Le Conteur v. London R. L. R.* 1 Q. B. 54, the plaintiff gave a chronometer, which he had been carrying in his hand, to a porter of the defendant, who, in the presence of the plaintiff, placed it on a seat of a railway carriage. Both the porter and the plaintiff then left, and when the plaintiff returned the chronometer was not there. The court expressed the opinion that there had been a sufficient delivery to the carrier to render it liable; but it was not necessary to decide the point, as judgment was given for the defendant because the value of the chronometer had not been declared as required by the carriers' act. See *Glover v. London R. L. R.* 2 Q. B. 25. In *Talley v. Great Western R. L. R.* 6 C. P. 44, it is held that where a passenger's luggage is placed, at his request, in the carriage in which he travels, the contract of the carrier to carry it safely is subject to the implied condition that the passenger will take ordinary care of it, and, if his negligence causes the loss, the carrier is not liable. If a passenger in a vessel retains the exclusive possession of his baggage, the owners of the vessel are not responsible if the baggage is stolen. *Cohen v. Frost*, 2 Duer, 335. This was the case of a steerage passenger in an emigrant ship. In *Van Horn v. Kermit*, 4 E. D. Smith, 453, the owner of a ship on a foreign voyage was held liable for a trunk stolen from the state-room of the passenger. While it may be conceded that a carrier is not liable as such or as an innkeeper for articles usually carried on the person, and which are stolen from the berth of a passenger on a sleeping-car: *Pullman Palace Car Co. v. Smith*, 7 Chicago Legal News, 237; or on a steamboat: *Abbott v. Bradstreet*, 55 Me. 530, — there is a conflict of authority on the question whether such liability exists when such articles, or baggage for personal use which a passenger usually takes with him, are stolen from his state-room. In *McKee v. Owen*, 15 Mich. 115, the court were equally divided on this question. In *Macklin v. New Jersey Steamboat Co.* 7 Abb. Pr. (N. S.) 241; *Mudgett v. Bay State Steamboat Co.* 1 Daly, 151; and in *Gore v. Norwich Transp. Co.* 2 Daly, 254; the carrier was held liable in such a case. But in *The R. E. Lee*, 2 Abb. U. S. 49; *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. 302; *Clark v. Burns*, 118 Mass. 275;

seems not to be in the situation of a common carrier at all events, where he takes the passenger along with the goods.¹

§ 114. The arrival with the baggage in safety at the place of destination will not discharge the carrier until its delivery to the owner; although, unless demanded in a reasonable time, the liability of the carrier, in his strict character of a common carrier, will not continue.² (a) No passenger is required, however, to

¹ *Payne v. Partridge*, 1 Show. 257. *Walker v. Jackson*, 10 M. & W. 161. See *post*, 142.

² *Powell v. Myers*, 26 Wend. 591. *Hollister v. Nowlen*, 19 Wend. 234. Interference by the owner, by giving directions as to the care of the property, the transportation of which is

interrupted by the closing of a river, is not of itself an acceptance of the property by the owner, but merely evidence of it to be submitted to the jury, with the other circumstances of the case. *Bowman v. Teall*, 23 Wend. 306.

it was held that no such liability existed. In *Gleason v. Goodrich Transp. Co.* 32 Wis. 85, a passenger on a steamboat took a state-room and asked for a key, which was refused, on the ground that keys were not given. He placed in the state-room a valise, which was stolen therefrom. The court, admitting that if the state-room had been locked, the plaintiff could have recovered, was of the opinion that in the absence of proof of any general or special usage authorizing the placing the valise in an unlocked room, and no finding by the jury that the owner of the boat was guilty of negligence in not providing the state-room with a lock and key, and that such negligence caused the loss, the placing the valise in the state-room would not be a delivery of it to the carrier, and he would not be liable.

(a) Where a trunk was stolen from a ship two days after she arrived in port, it was held that although the owners of the vessel were not liable as common carriers, still the burden was on them to show that they were not guilty of negligence. *Van Horn v. Kermit*, 4 E. D. Smith, 453. In *Fisher v. Geddes*, 15 La. Ann. 14, it appeared that the hands on a steamboat were, on arrival at New Orleans, in the habit of taking the passengers' trunks from the boat to a railroad station and getting the baggage checked. Held, that the owners of the boat were liable for a non-delivery at the railroad. In *Midland R. v. Bromley*, 18 C. B. 372, a passenger on arriving at his destination delivered his luggage to a porter of the railway over which he had come and directed him to take it to another railway near by. The porter put it upon a truck and entered the other railway station, and the luggage was not afterwards seen. Held, that there was no evidence of a breach of the first railway to deliver, although it was assumed that it was the usual course for the porters to take luggage in this way from one station to another. In *Kent v. Midland R. L. R.* 10 Q. B. 1, the plaintiff took a ticket on the defendant railway from A to C, subject to a condition that the defendant should not be liable for injury "arising off its lines." The journey from A to C is by the defendant road to B, and thence by another road to C. At B there is one station used

expose his person in a crowd, or endanger his safety in the attempt to designate and claim his baggage; but if the delivery is made in conformity to a usage, so well established and notorious that it is to be presumed that the owner had knowledge of it, the carrier will be discharged.¹ (a)

§ 115. The implied undertaking of the proprietors of stage-coaches, railroads, and steamboats, to carry in safety the baggage of passengers is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as a traveller usually carries with him for his personal convenience.² (b) It is never admitted

¹ *Cole v. Goodwin*, 19 Wend. 251. *Great Northern R. v. Shepherd*, 8

² *Hawkins v. Hoffman*, 6 Hill, 586. Exch. 30; 14 Eng. L. & Eq. 367. *Smith v. London R.* 7 C. B. 782. And see *post*, § 259. *Jordan v. Fall River R.* 5 Cush. 69.

by both roads. There a porter took the luggage and put it on a truck, and wheeled the truck across to the platform from which the train of the other road was about to start to C. This was the last seen of it. In an action against the defendant, *held*, that the defendant was liable until there was a delivery to the other company, and that the burden was on the defendant to prove such delivery, and that this was not shown. Where a train of cars arrived at night, it was held that a passenger was obliged to demand her trunk that night, and that the carrier was not liable if it was destroyed by a fire in the night. *Roth v. Buffalo R.* 34 N. Y. 548. See *Ouimit v. Henshaw*, 35 Vt. 605. A different rule was laid down in *Carey v. Cleveland R.* 29 Barb. 35, where a woman was travelling alone. But in *Jones v. Norwich Transp. Co.* 50 Barb. 193, where a woman arrived on Sunday and did not call for her trunk for seventeen hours after arrival, it was held that the liability as carriers had ceased. As to the liability of a carrier with whom a passenger deposits baggage at the end of his journey, see *Van Toll v. Southeastern R.* 12 C. B. (N. S.) 75; *Harris v. Great Western R.* 1 Q. B. D. 515; *Parker v. South Eastern R.* 1 C. P. D. 618.

(a) In *Nevins v. Bay State Steamboat Co.* 4 Bosw. 225, the plaintiff, on arrival of the boat, went to look for his baggage, found a great crowd and confusion, went to a hotel near by and sent a porter for his baggage. Held, that he had a right to do so, and that the carrier was bound to take care of the trunks for a reasonable time after arrival.

(b) *Van Horn v. Kermit*, 4 E. D. Smith, 453. *Dibble v. Brown*, 12 Ga. 217. *Great Northern R. v. Shepherd*, 8 Exch. 30; 14 Eng. L. & Eq. 367. *Nordmeyer v. Loescher*, 1 Hilton, 499. *Wilton v. Atlantic Nav. Co.* 10 C. B. (N. S.) 453. *Smith v. Boston R.* 44 N. H. 325. Linen cut into shirt patterns is wearing apparel. *Duffy v. Thompson*, 4 E. D. Smith, 178. Where a person sent by a passenger train a quantity of merchandise, expecting to go himself in the same train, but did not, and the goods were lost without any gross negligence in the carrier, or any conversion by him, it was held that the carrier was not liable

to include merchandise; and it has been expressly held, that although the owners of steamboats are liable as common carriers, for the baggage of the passengers, that is, for such articles of necessity and personal convenience as are usually carried by passengers, they were not liable for the loss of a trunk containing valuable merchandise and nothing else; which trunk was lost after being taken on board the steamboat, and deposited with the ordinary baggage.¹ (a) Neither does the implied undertaking include a large sum of money. In a case very fully argued, it has been expressly decided, that where the baggage consists of an ordinary travelling-trunk, in which there was a large sum of money (\$11,250), such money is not considered as included in the term

¹ *Pardee v. Drew*, 25 Wend. 459.

for the loss. *Collins v. Boston & Maine R.* 10 Cush. 506. In this case, Dewey, J., said: "To avoid all misapprehension as to other cases, it may be, however, proper to remark, that in this opinion we have no reference to the cases where boxes of goods, bales of merchandise, or the like are, for a compensation to be paid therefor, received by carriers of persons for transportation by passenger trains, being known and understood not to be baggage. Such carriers may contract for carrying merchandise in these trains, and whenever they do so, they do it with the ordinary liability of carriers of merchandise." For cases of this kind see *Hannibal R. v. Swift*, 12 Wall. 262; *Butler v. Hudson River R.* 3 E. D. Smith, 571; *Glasco v. New York R.* 36 Barb. 557. See also *Smith v. Boston R.* 44 N. H. 325; *Cahill v. London R.* 10 C. B. (N. S.) 154, 13 C. B. (N. S.) 818. But the mere fact that the passenger pays for the carriage of a trunk because it weighs more than is allowed to go free, does not entitle the passenger to carry goods. *Cincinnati R. v. Marcus*, 38 Ill. 219. If a passenger, with the intent to avoid paying freight, takes merchandise into a passenger car on a railroad, he cannot hold the railroad company liable as a common carrier, although on the journey the merchandise, at the request of a servant of the company, is placed in the baggage car, and is lost. *Belfast R. v. Keys*, 9 H. L. Cas. 556. In *Cahill v. London R.* 10 C. B. (N. S.) 154, affirmed in *Exch. Ch.* 13 C. B. (N. S.) 818, a passenger by railway brought with him as luggage a box containing only merchandise. On the box in large letters was written the word "Glass." No information was given to the company's servants as to the contents of the box, nor was any inquiry made by them. Held, that the company was not liable for the loss of the box. See also *post*, § 266, n.

(a) *Stimson v. Connecticut River R.* 98 Mass. 83. In *Hudston v. Midland R. L. R.* 4 Q. B. 366, an action was brought against a carrier for refusing to carry a spring-horse, weighing seventy-eight pounds, as luggage. Held, that the action would not lie, the article not being luggage.

“baggage,” so as to render the carrier responsible for it.¹ (a) It was suggested in this case, that money in a trunk to pay travelling expenses might be included; but that was doubted, as men usually carry money to pay travelling expenses about their persons, and not in their trunks or boxes; and no contract can be implied beyond such things as are usually carried as baggage. An agreement to carry ordinary baggage may well be implied from the usual course of business; but the implication cannot be at all extended beyond such things as the traveller usually has with him as a part of his baggage. All articles which it is usual for persons travelling to carry with them, whether from necessity, or for convenience, or amusement (such as a gun, or fishing tackle), fall within the term “baggage.”² (b) So likewise does money, not

¹ *Orange County Bank v. Brown*, 9 Wend. 85. And see *Gibbon v. Paynter*, 4 Burr. 2298; *Batson v. Donovan*, 4 B. & Ald. 340. ² *Orange County Bank v. Brown*, *ub. sup.*

(a) *Whitmore v. Steamboat Caroline*, 20 Misso. 513. *Doyle v. Kiser*, 6 Ind. 242. *Hutchings v. Western R.* 25 Ga. 61; *Davis v. Michigan R.* 22 Ill. 278. A carrier is not liable for jewelry carried as merchandise in a traveller's trunk. *Richards v. Westcott*, 2 Bosw. 589. Nor for jewelry intended as presents for friends, nor for masonic regalia used by the passenger in his travels, nor for engravings. *Nevins v. Bay State Steamboat Co.* 4 Bosw. 225. Nor for silverware. *Bell v. Newton*, 4 E. D. Smith, 59.

(b) *Parmelee v. Fischer*, 22 Ill. 212. Manuscript books, the property of a student and necessary to the prosecution of his studies, have been held to be baggage. *Hopkins v. Westcott*, 6 Blatchf. C. C. 64. So, of a manuscript book, containing a price list, carried by a travelling agent. *Gleason v. Goodrich Tr. Co.* 32 Wis. 85. So, of surgical instruments in the trunk of a surgeon in attendance upon troops. *Hannibal R. v. Swift*, 12 Wall. 262. In considering the amount of baggage a traveller may reasonably have, the jury may take into view his residence, business, station in life, the place from which he came, and that to which he is going. *Nevins v. Bay State Steamboat Co.* 4 Bosw. 225. Pistols are included in the term “baggage.” *Woods v. Devin*, 13 Ill. 746. So is a revolver. *Davis v. Michigan R.* 22 Ill. 278. Whether a bed, pillows, &c., are baggage, has been held a question for the jury. *Quimit v. Henshaw*, 35 Vt. 604. In *Connolly v. Warren*, 106 Mass. 146, it was held as a matter of law that a feather-bed belonging to an emigrant passenger from Ireland to the United States was not baggage, it appearing that he did not intend to use it on the passage; and the court refused to submit the case to the jury. So, in *Macrow v. Great Western R. L. R.* 6 Q. B. 612, as to sheets, blankets, and quilts, intended for household use.

exceeding a reasonable amount;¹ (a) and a watch has been held to be a part of a traveller's baggage, and his trunk a proper place in which to carry it.² (b)

§ 116. The Supreme Court of Pennsylvania have considered that it is not obvious in what manner the court can restrict the quantity or value of the articles that may be deemed proper or useful for the ordinary purposes of travelling; because in the nature of things it is susceptible of no precise or definite rule; and when there is an attempt to abuse the privilege, a court must rely upon the intelligence and integrity of the jury to apply the proper corrective. The defendants in this case requested the court to charge the jury that they (the defendants) having had no notice that the trunks in question contained jewelry, or other articles of greater value than ordinary wearing apparel, they were not liable for such articles of jewelry; but the court refused, and the jury found for the plaintiff; and judgment was affirmed in error.³

§ 117. The common law knew no distinction in respect to the liability of a common carrier, between a letter and any other thing; and a private postmaster was precisely in the situation of any other carrier.⁴ But the statute of 12 Charles II. having established a general post-office, and taken away the liberty of forwarding letters by private post,⁵ it was thought that an alteration had been made in the obligation of the postmaster-general; and, in the case of *Lane v. Cotton*,⁶ three judges determined, against the well-supported opinion of Chief Justice Holt, that the postmaster was not answerable for the loss of a letter with exchequer bills in it; and that the postmasters enter into no contract with individuals, and receive no hire, like common carriers, in proportion to the risk

¹ *Weed v. Schenectady R.* 19 Wend. 534. *Cole v. Goodwin*, *ub. sup.*

² *Jones v. Voorhees*, 6 Ohio, 358. See *Pudor v. Boston R.* 26 Maine, 458; and *post*, § 475 *et seq.*

³ *McGill v. Rowland*, 3 Barr, 451.

⁴ *Jones on Bailm.* 109, 110.

⁵ *Carth.* 487; 12 Mod. 482.

⁶ *Lane v. Cotton*, 1 Ld. Raym. 546.

(a) *Illinois Central R. v. Copeland*, 24 Ill. 332. A traveller on a sea voyage may carry a reasonable sum of money in his trunk. *Duffy v. Thompson*, 4 E. D. Smith, 178; *Merrill v. Grinnell*, 30 N. Y. 594. *Dunlap v. International Steamboat Co.* 98 Mass. 371.

(b) *McCormick v. Hudson River R.* 4 E. D. Smith, 181. The same rule applies to such articles of jewelry as are ordinarily worn on the person. *Ibid.*

and value of the letters under their charge, but only a general compensation from government. The same question was at a later period discussed in a case brought against the postmaster-general, to recover the amount of a bank-note stolen by one of the sorters of letters, when the court adhered to the doctrine of the three judges in the above-named case, against the opinion of Lord Holt.¹ Lord Mansfield in this case held that there was no analogy between the postmaster and a common carrier; because the postmaster has no hire, enters into no contract, and carries on no merchandise or commerce; the post-office is a branch of revenue, and a branch of police, created by act of Parliament; as a branch of revenue, there are great receipts, but there is likewise a great surplus of benefit and advantage to the public, arising from the fund; as a branch of police, it puts the whole correspondence of the country (for the exceptions are very trifling) under government, and intrusts the management and direction of it to the crown.

§ 118. In the United States, it is also held that the postmasters are merely public officers appointed by, and responsible to, the government; that the contracts made by them officially are public contracts binding on the government, but not on themselves personally.²

§ 119. But a postmaster is considered to be liable in a private action for damages arising from misfeasance, or for negligence, or want of ordinary diligence in his office, in not safely transmitting a letter, although not liable like a common carrier for the safe conveyance of a letter from his post-office to another. His liability, it was considered, is more like that of a warehouseman; that is, he is liable for no other losses or injuries than those arising from ordinary neglect on his part. Therefore, where a letter, which contained bank-notes, and which was mailed at a town in Ohio, and directed to the plaintiff at New Berlin, in Pennsylvania; from which, by regular course of mail, it was to be sent to the distributing office in Chambersburg; and the evidence went to show that the letter had been purloined by an assistant in the

¹ *Whitfield v. De Spencer*, Cowp. 754. money contained in a letter delivered at the post-office in his absence, and afterwards lost.

² *Dunlop v. Munroe*, 7 Cranch, 242. A postmaster is not liable for *Bolan v. Williamson*, 2 Bay, 551.

post-office at Pittsburg; it was held that the postmaster at Pittsburg was not liable for the loss.¹

§ 120. A deputy postmaster, or clerk in the office, is answerable in a private suit for misconduct or negligence; as for wrongfully detaining a letter an unreasonable time.² But the assistants of deputy postmasters do not stand in the situation of servants to them; and, therefore, a deputy postmaster is not liable for the act of his assistant in purloining money, unless, perhaps, he retains him after having found him to be unfaithful.³ The deputy is not, therefore, liable for the consequences of any losses, delinquencies, or embezzlements of his official assistants, if he exercises due care and reasonable superintendence over their official conduct, and he has no reason to suspect them of any negligence or misconduct.⁴

§ 121. It has been held in Ohio, that a mail contractor is not liable to the owner of a letter containing money transmitted by mail, and lost by the carelessness of the contractor's agents in carrying the mail; and the reasons assigned by the court were that a mail carrier has no contract with those who transmit articles by the public mail, and he receives no fee or reward from them; that his contract is with the government of the United States for the performance of acts in the execution of a public function; he is remunerated by the government; and the duty he takes upon himself by the contract he is sworn to perform. So far, then, as the transmission of the mail is concerned, a mail contractor is a public agent, and, as such, only responsible.⁵

§ 122. There is another kind of property for the carriage of which persons do not become liable as common carriers. In respect to the carriage of slaves, the question has more than once arisen, how far the carrier of them incurs the common law responsibility. In *Boyce v. Anderson*, in the Supreme Court of the United States,⁶ it was held that the law regulating the responsibility of common carriers does not apply to the case of carrying intelligent beings, such as negroes. The carrier has not, and

¹ *Schroyer v. Lynch*, 8 Watts, 453.

See *Collett v. London R.* 16 Q. B. 984, 6 Eng. L. & Eq. 305.

² *Rowning v. Goodchild*, 3 Wils.

443. *Stork v. Harris*, 5 Burr. 2709.

³ *Schroyer v. Lynch*, *ub. sup.*

⁴ *Story on Bailm.* § 463.

⁵ *Conwell v. Voorhees*, 13 Ohio, 523.

⁶ *Boyce v. Anderson*, 2 Pet. 150. And see *Stokes v. Saltonstall*, 13 Pet. 181.

cannot have, the same absolute control over them that he has over inanimate matter; and in the nature of things, and in their character, such human beings are passengers. Therefore the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than that which is applicable to the carriage of common goods. In South Carolina it has also been held, that there is a manifest distinction between the liability of the carrier with respect to the transportation of a slave and a bale of goods; and that the strictness of the common-law rule of liability is not, from the nature of the subject, applicable to the carriage of the former.¹ The Supreme Court of Alabama have held, on the authority of the above case of *Boyce v. Anderson*, that the strict rule of the common law in respect to the responsibility of common carriers does not apply to the conveyance of slaves as passengers by a carrier for hire; and that for such passengers a carrier is liable only for ordinary neglect. But if slaves have paid no hire for their passage, the carrier would only be responsible in the case of gross neglect; in other words, a less degree of negligence makes a carrier liable to a passenger who has paid, or is bound to pay his hire, than is required to make him responsible to one from whom he is to receive no reward.²

¹ *Clark v. McDonald*, 4 McCord, 223.

² *Williams v. Taylor*, 4 Port. Ala. 234. The owners of a boat are not liable for the loss of a slave, employed as one of the boat hands, unless the loss was occasioned by the wilful misconduct or culpable negligence of the captain. *McDaniel v. Emanuel*, 2 Rich. 455. Where a slave was hired to work on a railroad, and the slave, with the knowledge of the conductor, went on the cars and was carried beyond the place at which his services were that day required, and in jump-

ing from the cars while in motion was killed; it was held that the company were liable to the owner of the slave for the loss. *Duncan v. Railroad Co.* 2 Rich. 613. It has been held in Tennessee that, where a hired slave dies or runs away, the fact of such death or running being proved by the hirer, the owner must prove that negligence intervened to charge the hirer with the loss. *Runyan v. Caldwell*, 7 Humph. 134. So in Kentucky. *Hawkins v. Phythian*, 8 B. Mon. 515. *Swigert v. Graham*, 7 B. Mon. 662. (a)

(a) See *Sill v. South Carolina R.* 4 Rich. 154; *McClenaghan v. Brock*, 5 Rich. 17; *Folse v. New Orleans Co.* 19 La. Ann. 199.

CHAPTER V.

OF THE DUTY OF A COMMON CARRIER TO RECEIVE GOODS, AND OF THEIR DELIVERY TO HIM AS THE COMMENCEMENT OF HIS RESPONSIBILITY.

§ 123. As has been already stated, a common carrier is distinguished from a private carrier both in respect to the duty which the law imposes upon him, in consequence of the public employment he has voluntarily assumed, to receive goods which are offered for carriage, and in respect to his responsibility for their safety after they are in his custody.¹

§ 124. In respect to the first-mentioned distinction, the law has been lately laid down by the Supreme Court of the United States, that a common carrier "is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment; and is liable to an action in case of refusal."²(a) But in order to render a carrier liable in an action for refusing to take charge of goods, there must be tendered him a reasonable compensation.(b) Indeed, no person is a com-

¹ See *ante*, § 67.

² *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344. And see *post*, §§ 590, 612; *Crouch v. Great Northern R.* 11 Exch. 742, 34 Eng. L. & Eq. 573; *Merriam v. Hart-*

ford R. 20 Conn. 354; *Jordan v. Fall River R.* 5 Cush. 69; *Morton v. Tibbett*, 15 A. & E. 428. That a common carrier may prescribe reasonable conditions on which he will receive the goods, see *post*, § 234 *et seq.*

(a) And there is no distinction in this respect between the liability of a common carrier, whose business is entirely within the country, and that of a carrier who transports goods to a place without the country. *Crouch v. London R.* 14 C. B. 255; 25 Eng. L. & Eq. 287. Where a carrier refused to take goods consigned to A for sale, it was held that A had no cause of action against the carrier. *Lafaye v. Harris*, 13 La. Ann. 553.

(b) *Galena R. v. Roe*, 18 Ill. 488. See *Shipper v. Penn.* R. 47 Penn. State, 338. In *Lamar v. New York S. Nav. Co.* 16 Ga. 558, the inquiry was whether the freight asked was the usual freight. And in *Fitchburg R. v. Gage*, 12 Gray, 393, it is held that a common carrier is not obliged to transport goods of the same kind for all persons at the same rates; that each person may be charged what is reasonable in each case; that "if for special reasons, in iso-

mon carrier in the sense of the law who is not a carrier for hire and it is the reward which renders him liable; as Lord Coke says the carrier "hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him."¹ Still, it is not required that the reward to be tendered should be a fixed sum; it being sufficient if it be in the nature of a *quantum meruit* to or for the benefit of the bailor;² yet if the party offering the goods avers

¹ Co. Litt. 89 a.

² Rogers v. Head, Cro. Jac. 262. See *post*, Chap. IX. Assumpsit against a common carrier; and upon motion in arrest of judgment, for that he was not charged as a common carrier; and that the promise was not for any certain sum, but only that he would, *rationabiliter*, content him; *non alocatur*, "for the consideration is sufficient, because a carrier may demand, and the other is bound to pay, as much as

is reasonable. *Bastard v. Bastard*, 2 Show. 81. Action against a carrier for loss of a box; upon motion in arrest of judgment, because no particular sum had been agreed upon for the carriage, but only that a reasonable reward was to be paid, held well enough; for as in such case a carrier may maintain a *quantum meruit*, he is as much liable as if there is a particular agreement for a sum certain. *S. P.* admitted in *Lovett v. Hobbs*,

lated cases, the carrier sees fit to stipulate for the carriage of goods and merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary, and reasonable rates, he may undoubtedly do so, without thereby entitling all other persons and parties to the same advantages and relief." See *Thayer v. Burchard*, 99 Mass. 508; *Sargent v. Boston & Lowell R.* 115 Mass. 416; *New England Exp. Co. v. Maine Central R.* 57 Me. 188; *Sandford v. Railroad*, 24 Penn. St. 378. A carrier is not obliged to carry goods in the order in which they are received, without regard to their character and condition. *Peet v. Chicago R.* 20 Wis. 594.

In England railway companies are prohibited by statute from giving any undue or unreasonable preference or advantage to or in favor of any particular person or any particular description of traffic. 17 & 18 Vict. c. 31. See *In re Ransome*, 1 C. B. (N. S.) 437, 38 Eng. L. & Eq. 231; *In re Oxlade*, 1 C. B. (N. S.) 454, 40 Eng. L. & Eq. 234; *In re Marriott*, 1 C. B. (N. S.) 499, 40 Eng. L. & Eq. 250; *Caterham R. v. London R.* 1 C. B. (N. S.) 409, 40 Eng. L. & Eq. 259; *Baxendale v. London R. L. R.* 1 Ex. 137; *Garton v. Bristol R.* 4 H. & N. 33; *Baxendale v. North Devon R.* 3 C. B. (N. S.) 324; *In re Harris*, Ib. 693; *In re Jones*, Ib. 718; *Baxendale v. Eastern Counties R.* 4 C. B. (N. S.) 63; *In re Ransome*, Ib. 135; *In re Cooper*, Ib. 738; *Piddington v. Southeastern R.* 5 C. B. (N. S.) 111; *In re Baxendale*, Ib. 309; *Garton v. Great Western R.* Ib. 669; *In re Nicholson*, Ib. 366; *In re Garton*, 6 C. B. (N. S.) 639; *Bennett v. Manchester R.* Ib. 707; *Myers v. London R. L. R.* 5 C. P. 1; *West v. London R. L. R.* 5 C. P. 622; *In re Palmer & London R. L. R.* 6 C. P. 194; *In re Parkinson*, Ib. 554; *Great Western R. v. Sutton*, L. R. 4 H. L. 226.

and proves his readiness and willingness to pay the money for the carriage, it will, it seems, be considered as equivalent to a tender.¹ Payment may also sometimes be inferred; as, in a suit against stage owners for loss of baggage, payment of the fare need not be expressly proved, inasmuch as it may be inferred, without violent implication, it being seldom if ever neglected.²

§ 125. Nevertheless, there may be reasonable grounds for a refusal by a carrier to take the goods, and such grounds as will, if supported, be a legal defence to an action for the non-carriage of the goods. If a carrier refuses to take charge of goods because his coach is full, it is a reasonable ground of refusal.³ In the words of Mr. Justice Best, "he must take what is offered to him, to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage."⁴ So also if he has no convenient

2 Show. 129. *Boulston v. Sanderford*, Skin. 279. *Jackson v. Rogers*, 2 Show. 328. *Riley v. Horne*, 5 Bing. 217. *Macklin v. Waterhouse*, 5 Bing. 212. *Hollister v. Nolen*, 19 Wend. 234. *Cole v. Goodwin*, 19 Wend. 251. Bac. Abr. *Carriers*, B. 2 Kent, Com. 598. Story on Bailm. § 508. Carrier liable to be sued if he refuse to carry goods for the common reward. *Harrell v. Owens*, 1 Dev. & Bat. 273. *Anon. v. Jackson*, 1 Hayw. 14. "It is exceedingly clear that no person is a common carrier, in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result. If no hire or recompense is payable *ex debito justitiæ*, but if something is bestowed as a mere gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier; but he is a mere mandatary or gratuitous bailee; and of course his rights, duties, and liabilities are of a very different nature and character from those of a common carrier. It is not necessary that the

compensation should be a fixed sum, or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a *quantum meruit*, to or for the benefit of the company." Per Story, J., in *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story, 35.

¹ Story on Bailm. § 508. *Pickford v. Grand Junction R.* 9 Dowl. 766. And see *post*, § 356 *et seq.*; and *post*, § 418.

² *M'Gill v. Rowland*, 3 Barr, 451.

³ Action against a coach-master, for refusal to carry goods; but evidence being given that the coach was full, wherefore the defendant denied to take charge of the goods, it was agreed to be a good answer; "for if an hostler refuses a guest, his house being full, and yet the party says he will shift, &c.; if he be robbed the hostler is discharged." *Lovett v. Hobbs*, 2 Show. 127.

⁴ *Riley v. Horne*, 5 Bing. 217. It is agreed, says Cowen, J., in *Cole v. Goodwin*, by all the books, that while the carrier enjoys the privileges of a common carrier, it is a duty he cannot escape in any form, to receive goods, if he has room to carry them, for a reasonable reward; and the

means of carrying the goods offered with security;¹ or because the goods are of a nature which will at the time expose them to extraordinary danger or popular rage;² (a) or because the goods are not of a sort which he is accustomed to carry;³ and if the owner of the goods will not tell the carrier what his goods are, and what they are worth, the carrier may refuse to take them, but if he does take charge of them, he waives the right to know their contents and value.⁴ (b) So if the goods are brought at an unreasonable time.⁵ And a carrier, moreover, is not bound to receive goods until he is ready to engage in their transit.⁶

reasonable reward may be set down as the accustomed reward for like services. *Cole v. Goodwin*, 19 Wend. 261. *White v. Toncray*, 9 Leigh, 347. *Robins, ex parte*, 7 Dowl. 566.

¹ Case against a defendant, a common carrier, for refusing to carry a pack, though offered his hire; and held by the Lord Jeffries, "that the action is maintainable as well as it is against an innkeeper for refusing a guest, being tendered satisfaction for the same. Note, it was alleged and proved, that he had convenience to carry the same, and the plaintiff had a verdict. *Jackson v. Rogers*, 2 Show. 327.

² Case against a common carrier for so negligently carrying wheat that it was seized by a mob during riots. But as the defendant had been prevailed upon to send it by a private boat, and not in his usual course of carriage, at the express request of the plaintiff, the court held that it was a question of fact for the jury to find if the corn had been put on board according to the usual course of dealing with a common carrier; and the jury having found

that it was not a transaction in the common course of trade, it was to be considered as a charge received under such circumstances, that if the defendant had been apprised of them, it is clear he would not have contracted to receive them as a common carrier; and that there was a tacit stipulation that he should not be answerable for any damage which might arise from the mob; without which no reasonable man would have undertaken for the carriage of the goods. *Edwards v. Sherratt*, 1 East, 604.

³ See *ante*, § 99 *et seq.*, and *post*, § 209 *et seq.*

⁴ *Great Northern R. v. Shepherd*, 8 Exch. 30; 14 Eng. L. & Eq. 367. And see *post*, § 356.

⁵ Story on Bailm. § 508. *Pickford v. Grand Junction R.* 12 M. & W. 766. And see *post*, § 136.

⁶ *Ibid.* *Lane v. Cotton*, 1 Ld. Raym. 652; 1 Comyns, 105. In England it is considered that railway companies are not in general bound to provide means of carrying every possible description of goods, but that they have a discretionary power in this respect. The

(a) See *Pearson v. Duane*, 4 Wall. 605, cited *post*, § 532, n.

(b) The text, that a carrier has a right to refuse to carry goods unless the owner of the goods will tell him what the goods are, is supported by a *dictum* of Best, C. J., in *Riley v. Horne*, 5 Bing. 217. But in *Crouch v. London R.* 14 C. B. 255, 25 Eng. L. & Eq. 287, a plea that the carrier asked what the packages contained, and the owner refused to tell, was held bad. See also *The Nitro-Glycerine Case*, 15 Wall. 524, 535.

§ 126. And it has been considered in this country that the rule of the common law that a person who holds himself out as a common carrier is obligated to take employment at the current price will not apply, unless the carrier has a particular route between certain fixed termini; and that, although in England the duty of the carrier to carry at request upon a particular route is the criterion of the profession, it should not be so in this country. At least it has been so considered in so far as it relates to the State of Pennsylvania. Chief Justice Gibson, in delivering the opinion of the Supreme Court of that State, in *Gordon v. Hutchinson*,¹ held that rules which have received their form from the business of a people whose occupations are definite, regular, and fixed, must be applied with much caution and no little qualification to the business of a people whose occupations are more vague, desultory, and irregular, than is the case in an old country, and one comparatively limited in point of territory, like England. In Pennsylvania, he said, there were no carriers exclusively between particular places before the establishment of public lines of transportation; and, according to the English rule, there could have been no common carriers, for it was not pretended that a wagoner could be compelled to load for any part of the Continent; and nothing, he said, was more common formerly than for wagoners to lie by, in Philadelphia, for a rise of wages. He admitted that the policy of holding the carrier liable as an insurer was more obviously dictated by the solitary and mountainous region through which his course for the most part lay, than it is by the frequented thoroughfares of England.

§ 127. In the above case reference is made to the extraordinary risk of transporting through a region "solitary and mountainous." Now the common law has considered it reasonable, that the carrier should, in cases of extraordinary risk, have the power of contracting by special contract upon extraordinary terms.² It is laid down, that if the rules of commercial law impose upon the carrier

Liverpool & Manchester Co., however, constitutes an exception. See St. 7 Geo. 4, c. 29, § 138 (Local and Personal). Walf. Sum. Law of Railroads, 304.

¹ *Gordon v. Hutchinson*, 1 Watts & S. 285. And see the decision in this

case, and the views of Chief Justice Gibson, more fully stated, *ante*, § 70. See also *Steinman v. Wilkins*, 7 Watts & S. 466.

² *Jeremy on Carr.* 39, 42. *Story on Bailm.* § 549. *Post*, Chap. VII.

the responsibilities of an insurer, his reward ought in every case to correspond with the greater warranty undertaken, and additional precautions necessary to be provided by him.¹ "As the law makes the carrier an insurer," says Mr. Justice Best, "and as the goods he carries may be injured or destroyed by many accidents, against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of their destination as for the labor and expense of carrying them there."² If a person send to a carrier's office to know his rate of charges, the carrier is bound by the representation there made by his clerks; and if the goods are sent upon the faith of such representation, the carrier cannot charge more than the sum named, although the clerk may have inadvertently fallen into a mistake.³

§ 128. The compensation of companies incorporated for the

¹ *Jeremy, ub. sup. Gibbon v. Paynton*, 4 Burr. 2301.

² *Riley v. Horne*, 5 Bing. 217. Where a carrier was to carry a bag of gold across Hounslow Heath, it was thought that he was justly entitled to charge a rate of remuneration proportioned to the increased risk he run by so doing. *Tyler v. Morrice*, Carth. 486. And see *Sheldon v. Robinson*, 7 N. H. 157. *Orange County Bank v. Brown*, 9 Wend. 114. *Hollister v. Nowlen*, 19 Wend. 234, 241.

³ *Winkfield v. Packington*, 2 Car. & P. 600. In England, a railway company, under the provisions of the act of incorporation, have a right to fix their own charges for the carriage of goods, subject only to the conditions imposed by their act. It usually forms part of these conditions that the charges shall be reasonable and equal to all persons, or equal under the like circumstances; and that no favor shall be shown thereby to one person or description of persons at the expense of another. The criterion for determining how far a charge is reasonable or not, is to consider the trouble, expense, and responsibility

attending the receipt, carriage, and delivery of the goods in question. Where these are equal, the charge should be the same; where they vary, the charge may fairly be varied in the same proportion. For instance, for small parcels more may fairly be charged by the company than a proportionate part, according to weight, of the price of larger parcels of the same commodity, by reason of the greater trouble in receiving, despatching, and delivering them, and their exposure to a much greater risk of abstraction and loss. But if a number of small parcels are united in one large package, and in that state delivered to the company, consigned to one person, the trouble and responsibility are reduced to much the same degree as if all the articles contained in the package were the property of the same owner and intended to be delivered to him, the only difference being, that in the former case — supposing a misdelivery or other conversion of the goods by the agents or servants of the company — the company would be liable to several actions of trover instead of one. *Walf. Sum. Law of Railways*, p. 317.

purpose of acting as common carriers is sometimes subject to rules imposed by the legislature ; and acts of the legislature conferring privileges upon such a company, and professing to give the public certain advantages in return, are to be construed strictly against the company and liberally in favor of the public. By the acts of Parliament, under which the Great Western Railway Company in England was incorporated, it was provided that the charges for the carriage of goods should be reasonable and equal to all persons, and that no reduction or advance should be made, either directly or indirectly, in favor of or against any particular person. The company acted themselves as carriers for the public, and issued certain scales of their charges for carriage of goods, including the collection, loading, unloading, and delivery of parcels ; and they also carried goods for other carriers, to whom they made certain allowances as an equivalent for the trouble of the collection, &c., of parcels ; such collection, &c., being performed by the carriers. But in their dealings with A, a particular carrier, they refused to make such allowances, but were willing to perform for him all the things which formed the consideration for such allowances, and it was held that the charges to A were not equal or reasonable. The company, in their transactions with the public and with other carriers, made the following distinction as to their charges for carriage : In the case of the public, if there were several packages from one consignor to several consignees, or from several consignors to one consignee, the charge was upon the aggregate weight. In the case of carriers, if there were several packages for several consignees, the charge was upon the separate weight of each package, unless more than one package belonged to the same consignor (not being the carrier), or was going to the same consignee, in either of which cases the charge was upon the aggregate weight. But in such cases the company recognized the carrier only as the consignor and consignee of the goods, the agent of such carrier, in fact, receiving the goods at the end of the transit. It was held that the company were bound to treat a carrier as consignor and consignee for all purposes, including the mode of charging in the aggregate. And it was also held that A, having paid the extra charges in both of the instances above mentioned, might recover the amounts of such payments in an action for money had and received against the company ; such payments not being voluntary, but made in order to induce the company to

do that which they were bound to do without requiring such payments.¹ The restriction in the charter of the Camden and Amboy Railroad Company, limiting their charge for the transportation of property to the rate of eight cents per mile, extends and applies to the whole line of communication which they were incorporated and authorized to perfect, that is, from the city of New York to the city of Philadelphia. Or, in other words, the restriction was not intended to be applied only to the railroad, and to leave the company to charge at discretion on their conveyances by water.²

§ 129. The entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon him contemporaneously (*eo instanti*) with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely on delivery carries with it a promise to keep safely before the goods are put *in itinere*.³ (a) By the ordinances of France and of some other countries it is

¹ *Parker v. Great Western R.* 7 Man. & G. 253. *Edwards v. Great Western R.* 11 C. B. 588; 8 Eng. L. & Eq. 447. held responsible, as common carriers, at common law. *Hart v. Baxendale*, 6 Exch. 769; 6 Eng. L. & Eq. 468.

² *Camden R. v. Briggs*, 1 Zab. 406. See *post*, § 368. The English Statute 1 Will. 4, c. 68, does not exempt carriers from responsibility for loss of trinkets, &c., delivered to them for carriage at any other place than one of their offices or receiving warehouses, where a notice is affixed; and goods having been delivered to one of the defendants' servants in a cart at the plaintiff's own house, without any special contract, the defendants were

³ *Randleston v. Murray*, 8 A. & E. 109. *Dale v. Hall*, 1 Wils. 281. See also the case of *Gough v. Clinkard*, there cited, in which a shipmaster was held liable for the accident which happened in letting down into the vessel's hold a puncheon of rum, and all possible care was used. See also *Story on Bailm.* § 536; *Williams v. Peytavin*, 4 Mart. La. 304; *McHenry v. Philadelphia R.* 4 Harring. Del. 448; *Blanchard v. Isaacs*, 3 Barb. 389.

(a) If a heavy article has been carried by a truckman to the depot of a railroad corporation and injured while being loaded upon the cars, the railroad company are liable therefor if they had accepted and taken charge of the same; and it is no defence that the injury resulted in part from the carelessness of the truckman. *Merritt v. Old Colony R.* 11 Allen, 80. As to what is delivery to a vessel, see *post*, § 223 a. A person having goods to send by a railroad applied to the company for a car, which was run on a side track to his warehouse. The goods were loaded and the agent of the railroad notified. It was the custom of the company on receiving such notice to have the packages counted, sign a bill of lading, and then to send an engine and remove the car. Before these steps were taken, the goods were burned. Held, that there was a delivery to the carrier. *Illinois R. v. Smyser*, 38 Ill. 354.

provided, in cases of insurance, that if the time of the risk be not regulated by the contract, it shall commence, as to the goods, from the time they are put on board the vessel, or put into barges to be conveyed on board; or, in other words, from the moment they leave the shore; and the reason assigned for this regulation is, because the perils of the sea commence from the moment the goods are on the water.¹ The same doctrine is recognized and applied in this country,² and it properly applies to common carriers. In an action against the master of a ship for goods delivered into his custody, which were stolen from the ship by persons pretending to be officers with a warrant to search, he was held answerable for the value; for he had been used to receive the freight, and to make contracts for the transporting of goods.³ Where it was proved that by the established usage the goods were delivered by a wharfinger to the mate and crew of the vessel which was to carry them, Lord Ellenborough said: "Undoubtedly, where the responsibility of the ship begins, that of the wharfinger ends; the mate is such a recognized officer on board the ship, that delivering to him is a good delivery; if the jury believe that the mate received the goods, they are therefore in his care; and if they were once well delivered to the mate, their being lost on the wharf cannot affect the wharfinger."⁴ It is in many cases the usage of the masters and owners of ships to receive goods at the wharf or quay or in their boats, or at the warehouse of the shipper or his agent; or to take them at other special places into the custody of the proper officer of the ship; and in all such cases their liability as carriers commences at the instant of such acceptance of the goods.⁵

§ 130. A ferryman is liable as a common carrier, it has been held, for the safety of a carriage as soon as it is fairly on the slip or drop of the flat, though driven by the servant or owner of the carriage, as it is then, with the horses, in the ferryman's posses-

¹ Marsh. on Ins. p. 162.

² *Martin v. Salem Ins. Co.* 2 Mass. 420.

³ *Mors v. Slue*, T. Raym. 220, but more correctly reported in 1 Vent. 190 and 238, and recognized in 2 Ld. Raym. 919.

⁴ *Cobban v. Downe*, 5 Esp. 41. As soon as the goods are delivered on

board, the owners become insurers for all but the excepted cases. *Faulkner v. Wright*, 1 Rice, 107.

⁵ *Story on Bailm.* § 534. *Abbott on Shipp.* Pt. 3, c. 3, § 3. *Fragano v. Long*, 4 B. & C. 219. *Hart v. Baxendale*, 6 Exch. 769; 6 Eng. L. & Eq. 468. See *post*, § 301.

sion; ferrymen must have their flats so made that all drivers with horses and carriages may safely enter thereon, and if in making the attempt to enter the property is lost or injured, the ferryman is liable.¹ It was contended, on one occasion, that so far as relates to the transportation of carriages and horses, a ferryman ought not to be liable, on the ground that they were only the appendages of the persons, and that the carriers of persons are not liable for their appendages. To support which, it was shown, that if a passenger in a stage-coach lose his watch, or a lady her ring or shawl, the stage coachman is not liable. But it was considered by the court to be clear, that a ring is not like a carriage, and still more clear, that where there is no undertaking to carry, there can be no delivery, and consequently no responsibility for the loss.² (a)

§ 131. A person who is a common carrier may at the same time be a warehouseman, and after he receives the goods, and before they are put *in itinere*, they may be lost or injured. In such case, if the deposit in the warehouse is a mere accessory to the carriage, or in other words, if the goods are deposited for the purpose of being carried, such person's responsibility, as a common carrier, begins with the receipt of the goods.³ (b) That is, he then becomes responsible for all losses not occasioned by inevitable casualty; whereas, if he were a mere warehouseman, he is not liable, unless he has been guilty of ordinary neglect.⁴

§ 132. If a wharfinger undertakes to convey goods from his wharf to the vessel for which they are destined, in his own lighter, his liability is similar to that of a carrier. An action was brought, in which the defendant was both a wharfinger and a lighterman, for the loss of goods, which, while upon the defendant's premises, were destroyed by fire; and the question being, whether the de-

¹ *Miles v. James*, 1 McCord, 157.

⁴ *Forward v. Pittard*, 1 T. R. 27.

² *Cohen v. Hume*, 1 McCord, 439. And see *ante*, § 75.

³ See *ante*, § 75.

(a) *Wilsons v. Hamilton*, 4 Ohio State, 722.

(b) *Clarke v. Needles*, 25 Penn. State, 338. *Blossom v. Griffin*, 3 Kern. 569. *Fitchburg R. v. Hanna*, 6 Gray, 539. *Ladue v. Griffith*, 25 N. Y. 264. If a trunk is delivered at a railroad station at 11 A.M., to go in a train at 3 P.M., the railroad is liable as a carrier from the time of delivery, although the trunk is not checked until fifteen minutes before three, in accordance with the practice of the company. *Hickox v. Naugatuck R.* 31 Conn. 281.

fendant, whose duty it was to convey the goods from the wharf in his own lighter to the vessel in the river, was liable for the loss. Lord Ellenborough was of the opinion that the liability of the wharfinger, while he had possession of the goods, was similar to that of a carrier.¹

§ 133. An innkeeper, likewise, if he is at the same time a common carrier, is liable, as such, for any loss to goods sent to his inn (and received there to be forwarded), which happens before they are put in transit. It is common in London that the innkeeper has some concern in the coaches and wagons which put up at his house; and in those cases he is held liable as a carrier whenever goods are delivered at the inn for carriage.²

§ 134. But if a person is at the same time a common carrier, warehouseman, and forwarding merchant, and he receives goods into his warehouse to be forwarded, but not until he shall have received orders from the owners, the delivery to him is not as a common carrier, but only as a warehouseman; and consequently he is only answerable in the latter capacity if the goods are destroyed while in the warehouse by fire, and before such orders have been received.³ (a)

¹ *Maving v. Todd*, 1 Stark. 72.

² Per Buller, J., in *Hyde v. Trent Nav. Co.* 5 T. R. 389. See *ante*, § 69.

³ *Platt v. Hibbard*, 7 Cowen, 499. *Ackley v. Kellogg*, 8 Cowen, 223. Ros-

kell v. Waterhouse, 2 Stark. 461. See

ante, § 75; *Dickinson v. Winchester*, 4 Cush. 114; *Brook v. Pickwith*, 4 Bing.

218; *Goold v. Chapin*, 10 Barb. 612; *Chase v. Washburn*, 1 Ohio State, 244.

(a) *Michigan R. v. Shurtz*, 7 Mich. 515. *St. Louis R. v. Montgomery*, 39 Ill. 335. If any thing remains to be done by the consignor of goods or his agents after the delivery of the goods to a railroad company, before they are ready for transportation, the company are only responsible for them as warehousemen. *Barron v. Eldredge*, 100 Mass. 455. And this principle applies, where goods are delivered by one company to another to be forwarded, and the practice is not to forward them until a bill of the expenses incurred by the first company is given to the second. *Judson v. Western R.* 4 Allen, 520. See *contra*, *Michaels v. New York R.* 30 N. Y. 564. In *Watts v. Boston & Lowell R.* 106 Mass. 467, goods delivered to a carrier for transportation were burned in its depot. The defence was that they were kept, to be forwarded with other goods which had not arrived, for the convenience of the owner. The plaintiff's evidence tended to show authority and direction to the carrier to forward the different lots as they arrived. The judge charged that, if the defendant had either such authority or direction, he was liable as a carrier. A majority of the court held that this was erroneous. As to what is evidence of a direction to send goods, see *Nichols v. Smith*, 115 Mass. 332. A carrier who acts as the forwarding agent of the owner of goods in giving directions

§ 135. If the carrier directs that goods should be sent to a particular booking-office, he is answerable for the negligence of his booking-office keeper.¹ In *Camden and Amboy Railroad Company v. Belknap* (which was error from the Superior Court of the city of New York), Belknap brought an action on the case against the said company as common carriers between New York and Philadelphia, for the loss of his baggage; and the facts were, that the company, in the conducting of their business, kept two offices in New York, in one of which they were in the habit of receiving and (if requested) of locking up the baggage of persons intending to go on in the next boat that should depart. Belknap, intending to proceed on his journey by the next boat, left his baggage at this office, where it was received by the agent of the company; and it was lost before the departure of the next boat. Bronson, J., who gave the opinion of the court, considered it quite clear, upon this statement, that Belknap's trunks were in the possession of the company as common carriers, and that they were answerable in that character for the safe keeping of the property; and that their liability existed independent of any other contract, express or implied, for the safe keeping of the property, and without regard to any question of negligence; and that the judge would have been well warranted in instructing the jury that Belknap was entitled to their verdict.²

§ 136. It is by no means necessary to a delivery that merchandise should be entered upon any freight list, or that the contract of hire should be verified by any written memorandum.³ It is

¹ *Culpepper v. Good*, 5 Car. & P. 380. And see *Gilbert v. Dale*, 6 A. & E. 543.

³ *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story, 16. And see *Parker v. Great Western R.* 7 Man. & G. 253.

² *Camden R. v. Belknap*, 21 Wend. 354.

by way-bills or otherwise to the successive lines of transportation over which they are to be carried, beyond the termination of his own route, is responsible as such forwarding agent only for the want of reasonable diligence and care. *Northern R. v. Fitchburg R.* 6 Allen, 254. Where goods had been discharged from the barge of the defendant, a North River carrier, to his float in the Albany basin, and notice repeatedly given to the forwarders to take them away, and the goods were destroyed by fire, after the lapse of a reasonable time for the forwarders to have taken them away, the defendant was held liable as a carrier. *Goold v. Chapin*, 20 N. Y. 259. See also *Miller v. Steam Nav. Co.* 6 Seld. 431; *McDonald v. Western R.* 34 N. Y. 497.

always, however, more advisable for the owner of the goods, when he presents them for transportation, to have them entered on the carrier's books, and also properly marked; and if they be improperly marked, in consequence of which the carrier makes a misdelivery, the owner must bear the loss.¹ (a)

§ 136 a. It is not necessary to constitute a complete delivery to the carrier, that the goods should be left at the usual place of delivery at or before the hour appointed for receiving them, in order that they may go on the same day, if they are received at a later hour to be forwarded on the same day. As where a railway company published a printed notice, which was fixed over the door of their station, for the reception of goods in Liverpool, that all goods received after four o'clock, P.M., would be forwarded on the next working-day. Long after the publication of this notice, certain goods were brought to the station about half-past five, P.M., to be forwarded by the railway to Birmingham. The person who brought them (a servant of the owner) saw the company's weigher, and asked him "if there was any time," that is, for the goods to

¹ The *Huntress*, *Daveis*, 83.

(a) "Goods ought to be plainly and legibly marked, so that the owner or consignee may be easily known; and if in consequence of omitting to do so, without any fault on the part of the carrier, the owner sustains a loss, or any inconvenience, he must impute this to his own fault." Per *Ware, J.*, in *The Huntress, Daveis*, 82. It was held in this case where a trunk had been delivered to the owner, and afterwards taken back by the carrier and delivered to a third person who claimed it, that it was no defence to an action for the trunk that it was not distinctly marked, although the carrier acted in good faith. See *Finn v. Western R.* 102 Mass. 283. In *Krender v. Woolcott*, 1 *Hilton*, 223, it was held that if a carrier receives goods for transportation, and gives a bill of lading for them specifying the name of the consignee, he is responsible for the safe delivery of the goods, and if it is necessary he is bound to see that the goods are properly marked. And where flour, in sacks of different sizes, intended for two consignees, was sent on board a vessel without any mark distinguishing those intended for either consignee, and the master gave a bill of lading promising to deliver to one person four hundred and sixty-seven bags of thirty-five tons and nine hundred weight gross, it was held that he was bound to deliver the specified number of bags of such sizes as would come nearest to the weight specified. *Bradley v. Dunipace*, in *Exch. Ch.*, 1 *H. & C.* 521. The Court of Exchequer was equally divided in this case. 7 *H. & N.* 200. Where a receipt or a bill of lading is given, the marks on the goods are no evidence of the contract. *Rome R. v. Sullivan*, 25 *Ga.* 228.

proceed that evening. The weigher saying there was, the goods were placed by the company's porters on the trucks on which goods are carried upon the railway. The same person had on former occasions taken goods of the same kind to the station at a later hour, which never had been refused for being too late, and which had been forwarded the same evening. Upon these facts it was held, that there was evidence to go to the jury of a special contract by the railway to forward the goods in question on the same evening on which they were delivered.¹ (a)

§ 137. Delivery may also be made at a different place as well as at a different hour from the one established by notice or usage. If a package is received by the agent of a common carrier for transportation at his suggestion, at a place other than the office of

¹ *Pickford v. Grand Junction R.* 12 M. & W. 766.

(a) In New York a contract for the transportation of property on a steam-boat is not void because made on Sunday; nor because the voyage is to commence and does commence on Sunday. *Merritt v. Earle*, 31 Barb. 38; 9 N. Y. 115. Where a boat on the Mississippi River made a contract to take goods, which the owners of the boat alleged was broken by the neglect of the skipper in delivering the goods, it was held that as the time of the arrival of the boat was uncertain, a reasonable time must be allowed after the arrival of the boat to transport the goods to the bank of the river. *Barstow v. Furison*, 14 La. Ann. 335. See also *Williamson v. Dolsen*, 15 La. Ann. 94. See, as to horse-cars running on Sunday, *Sparhawk v. Union R.* 54 Penn. St. 61. In Massachusetts it is provided by statute that whoever on the Lord's day "does any manner of labor, business, or work, except works of necessity and charity," or "travels, except from necessity or charity," is punishable with a fine. It has been held under this statute that a person who takes a walk for exercise in the town where he lives is not a traveller, and that if he is injured by a defect in the highway he may recover. *Hamilton v. Boston*, 14 Allen, 475. But, if he goes in a horse-car from one town to another, not for necessity or charity, he is a traveller, and cannot recover if injured by the negligence of the carrier. *Stanton v. Metropolitan R.* 14 Allen, 485. This doctrine is, however, opposed to the current of authority. See *Philadelphia R. v. Philadelphia Towboat Co.* 23 How. 218; *Powhatan Steamboat Co. v. Appommattox R.* 24 How. 256. *The Metropolis*, U. S. D. C., N. Y., 1 Pars. Sh. 597; *Mohney v. Cook*, 26 Penn. St. 342. Under the Massachusetts rule a person may go to church by means of a public conveyance, and if he is injured through the negligence of the carrier, recover; and this doctrine has been applied to one who goes to a spiritualistic camp-meeting, believing in spiritualism as a religion. *Feital v. Middlesex R.* 109 Mass. 398. So he may go to visit a sick friend. *Doyle v. Lynn & Boston R.* 118 Mass. 35. See Bigelow L. C. Torts, 711-722, where this subject is fully discussed.

the carrier, and is entered on the way-bill, the carrier will be held answerable. As where a package was delivered to the agent of a stage-coach company at the post-office, where the stage was standing (and not at the office of the company), to be carried from Boston to Hartford, and was by the agent, when he received it, entered on the way-bill, he having previously directed the person to bring it to the post-office, and the package being lost before reaching Hartford; the court held, that the assent of the defendants that it should be left at the post-office, the receipt of it by the agent, and the entry of it upon the way-bill, took away what force there might otherwise have been in the objection that the package was not left at the office or place of business of the defendants.¹(a)

§ 138. Where the plaintiff sent an agent to the carrier's booking-office, and the agent desired a man to be sent to his (the agent's) house, to fetch a package, and it was brought by one of the carrier's men from the agent's house to the booking-office, it was held a delivery by the plaintiff to the carrier.²

§ 139. If a message be left at the booking-office of a carrier from N. to L., for his van to call for the plaintiff's baggage at another inn, for the purpose of its being carried to L., and the carrier's servant and van go to the other inn, and the plaintiff's luggage be there put into the carrier's van, it is a delivery to the carrier; and if the luggage is lost from the van, the carrier is as much liable for the loss as he would be if the luggage and the plaintiff had been taken to the defendant's regular booking-office.³

§ 140. The responsibility of a common carrier, therefore, is fixed by the acceptance of the goods, whether the acceptance be in a special manner, or according to the usage of his business.⁴ But an acceptance in some way is indispensable; for if it appears that there is no intention to trust the carrier with the custody of the goods, he will not be held liable.⁵ If they are placed in the

¹ Phillips v. Earle, 8 Pick. 182.

Com. 598. Harris v. Packwood, 3

² Boys v. Pink, 8 Car. & P. 361.

Taunt. 264. Boehm v. Combe, 2

Lloyd v. Barden, 8 Strob. 343.

Maule & S. 172.

³ Davey v. Mason, 1 Car. & M. 45.

⁵ Brind v. Dale, 8 Car. & P. 207.

⁴ Story on Bailm. § 533. 2 Kent, And see ante, §§ 76, 77, 82, 85.

(a) A delivery to the clerk of an agent of an express company, outside the office of such agent, is not a good delivery to the company. Cronkite v. Wells, 32 N. Y. 247.

carrier's cart or coach, without the knowledge and acceptance of the carrier, his servants, or agents, there has been indeed no bailment of them to the carrier, and of course he cannot be responsible for the loss of them.¹ If a passenger, travelling on the outside of a stage-coach, keeps a parcel or package in his own hands and under his own care; or takes his baggage with him into the interior of the vehicle, professing to watch and take care of it himself, and the thing is lost, the carrier is not responsible for it, because it was never delivered to him or his servants, or in any way intrusted to his or their custody.² Where an action was brought against a railroad company for the loss of an overcoat belonging to a passenger, it appearing that the garment was not delivered to the custody of the defendants, but that the passenger, having placed it on the seat of the car on which he sat, forgot to take it with him when he left, and it was afterwards stolen, the defendants were not held liable.³ *A fortiori*, a garment on the person of a passenger, as a shawl upon a lady, will be regarded as entirely within the possession and custody of the wearer, and the carrier will, therefore, be held not liable for the same in case it is lost or stolen.⁴ (a)

§ 141. In the case of *Miles v. Cattle*,⁵ the plaintiff received a parcel from G. to book for London, at the office of the defendant, as a common carrier, but instead of obeying that instruction, put the parcel into his own bag, intending to take it to London himself. The defendants having lost the bag, it was held that the plaintiff could not recover damages in respect of the parcel. Tindal, J., said the plaintiff, in violation of his trust, thought

¹ Lovett v. Hobbs, 2 Show. 127. Leigh v. Smith, 1 Car. & P. 640.

² Ad. on Cont., citing Boys v. Pink, 8 Car. & P. 361; Syms v. Chaplin, 5 A. & E. 634.

³ Tower v. Utica R. 7 Hill, 47.

⁴ See the opinion of Colcock, J., in Cohen v. Hume, 1 McCord, 439. A traveller, who drives his horse and wagon on board a ferry-boat, pays the usual toll for their transportation, selects a place for himself and retains the custody of his horse, without committing to the care of the ferryman

or his servants, or signifying any wish or purpose so to do, is bound to use care in the custody of his horse to prevent injury to the animal by its becoming restless. White v. Winnisimmet Co. 7 Cush. 155. Still, for culpable negligence on the part of the ferryman in providing a safe landing-place, the ferryman is liable. Wiloughby v. Horridge, 12 C. B. 742; 16 Eng. L. & Eq. 437. And see *post*, § 556.

⁵ Miles v. Cattle, 6 Bing. 743.

(a) See *ante*, § 113.

proper not to deliver the parcel to the defendant, but to deposit it in his own bag; thereby depriving the owner of any remedy he might have had against the defendant, and the defendant of the sum he would otherwise have earned for the carriage of the parcel. Likewise, in the case of the *Orange County Bank v. Brown*,¹ the president of the bank directed one P., who was going by steamboat from New York to Newburgh, to commit certain packages of money, amounting to a large sum, directly to the captain of the boat. P. not having followed such direction, the captain was not enabled to charge a reward for the carriage of the same, and neither the captain nor the defendants became responsible for its safety; and it was accordingly held, that the omission of P. to follow the directions was a violation of his trust, and that there was no delivery to the defendants by virtue of which they became accountable.

§ 142. Another case of non-acceptance by the carrier, in consequence of a want of trust and confidence in the carrier, is the case of the *East India Company v. Pullen*.² This was an action against a common lighterman on the Thames, in which it was held by Chief Justice Raymond, "that the usage of the company to place an officer, called a guardian, in the lighter, altered it from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself;" he thought the action, therefore, not maintainable. But the mere fact, that the owner or his servant goes with the goods, and not excluding the carrier from the custody, will not release the carrier from his responsibility arising in consequence of his acceptance of the goods in the usual course of business.³

§ 143. Indeed, in deciding upon the circumstances of a particular case, whether there has been an actual delivery or not, or such an one as fixes the responsibility peculiar to a common carrier, is often a matter of great nicety. Where goods were delivered at a wharf to an unknown person there, and no knowledge

¹ *Orange County Bank v. Brown*, 9 Wend. 85. And see as to baggage of passengers, *ante*, § 113.

² *East India Company v. Pullen*, 1 Stra. 690.

³ *Robinson v. Dunmore*, 2 Bos. & P. 418. *Cole v. Goodwin*, 19 Wend. 251. Both cases are cited *ante*, § 113.

of the fact was brought home to the wharfinger or his agents, this was held by Lord Ellenborough, not to be a sufficient delivery to charge him, either as wharfinger, or as a carrier, with the custody of the goods.¹ Where goods were left in the yard of an inn, at which the carrier and other carriers put up, but no actual delivery to the carrier or his servant was proved, it was held to be no delivery to the custody of the carrier; ² although the carrier is liable if the goods are lost after they get into the hands of the innkeeper, if delivered with the express or implied consent, and as the servant, of the carrier.³

§ 144. A person sent a parcel directed to another person in London, to the postmaster of B., to be forwarded to M. The postmaster received 2*d.* to book the parcel, and sent it by a mail-cart to the King's Arms inn, at M. He was accustomed so to take in parcels for the mail-cart. The innkeeper, at M., booked the parcel for London, charging 2*d.* as "booking" for his own trouble, and also charging on the parcel the demand for carriage from B., which he had paid. He forwarded the parcel by a mail-coach (of which the defendants were proprietors) to London.

¹ *Buckman v. Levi*, 3 Camp. 414. This was an action for goods sold and delivered. The goods (chairs) had been sent (as at other times) to a wharf, and such had been sometimes booked, sometimes not. The plaintiff's servant took them to the wharf, and left them on the premises there piled up among the goods, with a direction to the defendant, but had no receipt for them, nor was any entry respecting them made in the wharfinger's books; he had no conversation with the wharfinger, or any other person upon the premises, but only saw a person on the wharf whom he believed to be a servant of the wharfinger. Lord Ellenborough: "A due delivery of goods to a carrier or wharfinger, with due care or diligence, is sufficient to charge the purchaser. Before the purchaser can be charged in the present instance, he must be put into a situation to resort to the wharfinger for his indemnity. But no receipt was taken for the chairs;

they were not booked, and no person belonging to the wharf is fixed with a privity of their being left there; the defendant, therefore, is not furnished with a remedy over against the wharfinger, and is not himself liable as purchaser of the goods."

² *Selway v. Holloway*, 1 Ld. Raym. 46. This case arose out of another action on a contract to pay for hops, on delivery of them to the present defendant, a common carrier, and a verdict was twice found for that plaintiff. The hops had been lodged in the inn-yard, and no acknowledgment was shown of their receipt by any servant of the defendant; but it was proved that there were many other carriers who used the same inn. And the court said, "they were all of opinion that the hops could not be said to be delivered to Holloway."

³ Per Buller, J., in *Hyde v. Trent Nav. Co.* 5 T. R. 397. *Davey v. Mason*, 1 Car. & M. 45.

Several coaches were used to stop at the King's Arms inn, and the mail-coach in question pulled up there, but did not there change horses. The innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by mail or any other coach; and no regular booking-office was kept at the inn. The parcel having been lost, it was held, that the King's Arms was a receiving house of the defendants, within the Carrier's Act of 11 Geo. IV. and 1 Will. IV.; and that the plaintiff might properly sue the defendants on a contract to carry from M. to London.¹

§ 145. The question arose in the State of New York, What will constitute a delivery of goods to the master of a canal-boat? and it was held to be a sufficient delivery, if the goods intended for carriage are left by or near the boat, according to the usages of business; yet with the qualification, that such delivery must be accompanied with express notice to the master. The action was an action of trover, to recover the value of a box of dry goods, alleged to have been delivered to the defendant as master of a canal-boat, to be transported from Albany to Charlestown, in Montgomery County. It appeared, that before any goods were put on board, the plaintiff requested the defendant to receive a quantity of merchandise; that he consented, and on the 20th of November, 1824, gave a receipt for 30s. in full, for transporting the plaintiff's goods, described as four boxes of dry goods, and other articles. The bill of lading, dated November 24th, in the handwriting of the plaintiff, and subscribed by the defendant, stated four boxes of dry goods. On the evening of the 20th of November, the plaintiff came on board; the defendant inquired what dry goods he had, and he replied four boxes. He then made out the bill of lading, and delivered it to the defendant. It also appeared, that no more than four boxes of dry goods were actually received on board; and after being so received, on the evening of the 20th of November, the plaintiff came and inquired for his goods. He was informed of their reception, went into the room where they were, and returned, saying, all was right. The defendant delivered the four boxes according to his contract. On the part of the plaintiff it appeared, that five boxes of dry goods had been deposited on the dock, near the defendant's boat,

¹ *Syms v. Chaplin*, 5 A. & E. 634.

on the evening of the 20th of November. A man in the boat said the defendant was not on board, and the boxes were left lying on the dock. A person from the boat came, and assisted in unloading two of the four boxes brought by one of the cartmen. It also appeared, that it was customary for masters of canal-boats to receive, on deck, goods they were to transport. That the fifth box was brought in the evening, and placed on the dock where the boat lay. That some person on board said it was the defendant's boat; and that more goods of the plaintiff were coming on board. By Woodworth, J., who delivered the opinion of the court: "Admitting that, according to the usual custom and understanding of parties, a delivery on the dock, near the boat, is a good delivery so as to charge the carrier, it must always be accompanied with express notice; otherwise he is not answerable. Has that been done in the present case? So far from it, it appears to me, that in every stage of this transaction, the defendant was informed there were four boxes only. So the plaintiff declared to the defendant; such is the language of the receipt for the freight; and so is the invoice. From all this the defendant was warranted in taking on board four boxes of dry goods; and ought not to be chargeable for not taking on board the fifth box, although it might have been left on the dock. From the evidence, I think the defendant might well presume a fifth box was not intended for his boat. But whether it was or not, there was a failure on the part of the plaintiff to give the defendant information. The plaintiff was probably ignorant that there was more than four boxes. That is his misfortune; not a ground to charge the defendant, who appears to have acted with good faith; and could not know, from the instructions he had received, that any more than four boxes belonged to the plaintiff. The defendant may not have received the fifth box on board; it may, by mistake, have been put on board another boat; or perhaps stolen; but there is no presumption that the defendant ever converted it. All the facts in the case negative that presumption. I am therefore of opinion, that the plaintiff has not proved sufficient to make out a delivery of the goods."¹

§ 146. A delivery to the servant, or duly authorized agent, of a common carrier, who is in the habit of receiving packages, is

¹ Packard v. Getman, 6 Cow. 757.

undoubtedly a sufficient delivery.¹ As, if the mate of a ship is a recognized officer on board, and it has been the well-known usage to deliver to him, a delivery to him is a good and sufficient delivery.² But the drivers of wagons and of stage-coaches, carrying parcels for hire on their own account, and no reward therefor is to be received by the proprietors, will not, as has been seen, bind the proprietors.³ The bailment in such case can only be considered a bailment to the driver alone, and he therefore is alone responsible for the loss.⁴ A shipper contracting with the master of a steamboat, and knowing that the latter receives the goods, on his own account, as a part of his privilege, and not in his character of agent for the owners, does not render the owners liable for goods delivered by the shipper to the captain.⁵ In *King v. Lenox*,⁶ the ship was not a general ship, and was freighted wholly by the owner; the master had a privilege which was known to the plaintiff, and the plaintiff, in delivering his goods for shipment, to the master, dealt with him on his own responsibility, and not as agent for the owner. The case of *Walter v. Brewer*⁷ was in some respects the same: the defendant was owner of the ship, and loaded her himself, and the goods for which the plaintiff prosecuted were delivered on board clandestinely during the temporary absence of the defendant. The court held, that as there was nothing left to the care of the master but the care of the management and navigation of the ship, and especially the ship being known not to be a freighting ship, the clandestine delivery on board was not a delivery to the defendant, and that therefore he was not responsible for the goods.

§ 146 *a*. It is very clear, that if an article be delivered to a servant of a carrier, it must be to such an one as is intrusted to receive goods, and not to one engaged in other duties. Therefore, where a coat was delivered to the driver of a stage-coach, by a person not a passenger, to be delivered to another, in a different place, and the driver refused to put it on the way-bill, saying he

¹ See *ante*, § 91 *et seq.* *Jeremy on Carr.* 61. *Anjou v. Deagle*, 3 Harris & J. 206. *Lloyd v. Barden*, 3 Strob. 343.

² *Cobban v. Downe*, 5 Esp. 41.

³ *Ante*, §§ 76, 77. There is no intention to confide in the proprietors. See *ante*, § 140 *et seq.*

⁴ *Bignold v. Waterhouse*, 1 Maule & S. 259. *Williams v. Cranston*, 2 Stark. 48.

⁵ *Allen v. Sewall*, 2 Wend. 327; and 6 Wend. 335. See *ante*, § 85.

⁶ *King v. Lenox*, 19 Johns. 235.

⁷ *Walter v. Brewer*, 11 Mass. 99.

had no right to do so, but he would get the next agent to do it at the town of S., it was held, that there was no delivery of the coat to the coach proprietor, and that he was not responsible as common carrier for the loss thereof.¹ (a)

§ 147. The charterer, and not the general owner of a vessel, it has been seen, is the person liable for the acts of the master in the course of his employment.² Nothing is better settled, than that if the owners of a ship have chartered it to a third person, the captain must, for that voyage, be taken to be the agent of the latter for goods delivered to him; and the owners cannot, *hac vice*, be made liable for his acts. Thus, in an action against the owners of a ship for not delivering goods delivered on board, it was held by Lord Kenyon, that "although the defendants were owners, yet no express contract being proved with them, and the ship having been in fact chartered for that voyage by them to other persons, those persons were for that voyage to be deemed as the owners, and the captain as their agent *pro hac vice*; the liability being shifted by the charter from one party to the other."³ A delivery to the master of a vessel under a charter, the hirer

¹ *Blanchard v. Isaacs*, 3 Barb. 388.

² *James v. Jones*, 3 Esp. 27.

³ *Ante*, § 89; and *post*, § 395

et seq.

(a) In *Trowbridge v. Chapin*, 23 Conn. 595, a delivery to a deck hand of a steamboat was held insufficient, it not being his duty to receive goods. See *Wright v. Caldwell*, 3 Mich. 51; *Butler v. Hudson River R.* 3 E. D. Smith, 571; *Merriam v. Hartford R.* 20 Conn. 354; *Freeman v. Newton*, 3 E. D. Smith, 246; *Wells v. Wilmington R.* 6 Jones, 47; *Gleason v. Goodrich Tr. Co.* 32 Wis. 85. A carrier of passengers, to whom the valise of one passenger is delivered for carriage, is not liable to another passenger for the loss of property contained in it belonging to him, if no notice thereof is given to the carrier. *Dunlap v. International Steamboat Co.* 98 Mass. 371. See *Stimson v. Connecticut River R.* 98 Mass. 83.

The proprietors of a railroad who receive passengers and commence their carriage at the station of another road are bound to have a servant there to take charge of baggage, until it is placed in their cars; and if it is the custom of the baggage-master of the station, in the absence of such servant, to receive and take charge of baggage in his stead, the proprietors will be responsible for baggage so delivered to him. *Jordan v. Fall River R.* 5 Cush. 69.

If it is the custom of a railroad carrier to run its cars on a side track to receive grain at a private warehouse, it cannot capriciously require that the grain should be delivered in any other manner. *Galena R. v. Rae*, 18 Ill. 488.

having the whole control of her, for the time, to victual and man her, and who is to pay over a portion of the net proceeds to the owner, for the use of her, was held not to render the owner of her liable to the shippers for goods delivered on board the vessel, which had been embezzled, or otherwise not accounted for, by the master.¹ On the same principle it is, that the owner of a ferry is not liable for the loss of goods in crossing it, delivered to the ferryman, if the ferry be rented, and in possession of the ferryman as tenant.²

CHAPTER VI.

OF THE RESPONSIBILITY OF COMMON CARRIERS.

§ 148. THAT a common carrier is answerable, as has been already stated,³ for all losses which do not fall within the excepted cases of the "act of God" and "the king's (public) enemies," (a) has been the settled law of England for ages.⁴ The policy of imposing an extraordinary degree of responsibility upon common carriers was suggested by the edict of the Prætor in the Roman law,⁵ before which carriers were not put under any pecuniary obligation which did not belong to other bailees for hire. The edict referred to did not extend in terms to carriers on land, but in most, if not in all, modern countries, the rule which it pre-

¹ Reynolds v. Toppan, 15 Mass. 352. And see Schieffelin v. Harvey, 6 Johns. 170.

² Ladd v. Chotard, 1 Minor, 366. And see, as to Ferries, ante, § 82.

³ See ante, § 67.

⁴ 2 Kent, Com. 597. Woodleif v. Curteis, 1 Rol. Abr. 2 E. pl. 5. Coggs v. Bernard, 2 Ld. Raym. 918. Dale v. Hall, 1 Wils. 281. Forward v. Pittard, 1 T. R. 27. It is a general maxim in law, that *Actus Dei nemini facit injuriam*, that is, the act of God

is so treated by the law as to affect no one injuriously. Broom's Legal Max. 109. The maxim may be paraphrased and explained as follows: It would be unreasonable that those things which are inevitable by the act, which no industry can avoid nor policy prevent, should be construed to the prejudice of any person in whom there was no laches. 1 Rep. 97.

⁵ Story on Bailm. § 458.

(a) If goods are taken by the public enemy, the carrier is liable if his negligence has contributed to the loss. Holladay v. Kennard, 12 Wall. 254.

scribes has been practically expounded so as to include them.¹ But the rule in the civil law, in respect to an extraordinary responsibility, was not carried to the severe extent of the English common law. It did not make the carrier liable for superior or irresistible force, and it accounted robbery among the cases of irresistible force; and this act of violence came within the *damnum fatale* of the civil law, which exempted the carrier.² In the modern countries governed by the civil law (France, Spain, Holland, Louisiana, Scotland, and the German States), the same rule is generally, if it is not invariably, adhered to.³ As is stated by the learned author of "Commentaries on the Law of Bailments," the responsibility of common carriers, in the kingdoms and states just mentioned, may be summed up in the following brief statement: "They are responsible for damage caused by their servants, or by others in their employ and confidence, or under their protection; but they are not responsible for thefts committed with armed force or other superior power; and of course they are exempted from losses by mere accident and inevitable casualty."⁴

§ 149. Such also seems to have been the common law of England, as understood in the reign of Henry VIII., in which reign,

¹ Domat, B. 1, tit. 16, §§ 1, 2. 1 Bell, Com. §§ 398, 399, 402, 403. Ersk. Inst. B. 3, tit. 1, § 28.

² Ib. Pothier, Pand. Lib. tit. 9, n. 1, 7. Jones on Bailm. 96. 2 Kent, Com. 598. Dig. Lib. 4, tit. 9, l. 3, § 1.

³ Story on Bailm. § 488. 2 Kent, Com. 598. Pardessus, Droit Com. P. 2, tit. 7, c. 5, art. 537-555. Code Civil of France art. 1782, 1786, 1952. 1 Bell, Com. p. 465, 466. Abbott on Shipp. P. 3, c. 3, § 3, n. (1). 1 Voet ad Pand. lib. 4, tit. 9. Civil Code of Louisiana, art. 2722-2725. See Hunt v. Morris, 6 Mart. La. 676.

⁴ Story on Bailm. § 488, which refers to the above authorities, and to Merlin Repertoire, *Voiture Voiturier*. 2 Kent, Com. 598. Elliott v. Rossell, 10 Johns. 1. In Louisiana, where the civil and not the common law

prevails, the rule is less rigorous than the common-law rule, so that the owners of steamboats have been held not liable in Louisiana for a loss occasioned by fire, where proper diligence had been used. (a) But the jurisprudence of the States generally contains a general adoption of the common in preference to the civil law, and such is the case in Alabama. Jones v. Pitcher, 3 Stew. & P. 176, per Saffold, J. It was said by the Provincial Court of Appeals of Lower Canada, that the law creates the exception *force majeure*, or irresistible force; and that this constitutes the only difference between the law of bailments in England and in France. Hart v. Jones, Stuart, Lower Canada, 589. See Spence v. Chodwick, 10 Q. B. 517.

(a) Hunt v. Morris, 6 Mart. La. 676.

says Sir William Jones, "it appears to have been generally holden that a common carrier was chargeable, in case of robbery, only when he had travelled by ways dangerous for robbing, or driven by night, or at any inconvenient hour."¹ But, says the same author, in the commercial reign of Elizabeth, it was resolved, upon the same broad principles of policy and convenience which apply with respect to innholders, "that if a common carrier be robbed of the goods delivered to him, he shall answer for the value of them."² And, as before mentioned, it has long been the settled law of England, that a common carrier is responsible for all losses except those occasioned by the act of God and the king's enemies.³

§ 150. The true ground of the common-law rule just stated, Sir William Jones has observed, is the public employment exercised by the carrier, and the danger of his combining with robbers, to the infinite mischief of commerce and extreme inconvenience to society, and not the reward, which is considered by Sir Edward Coke as the reason.⁴ The policy of the rule of extraordinary responsibility, as before observed, was borrowed from the Roman law, but for the reason just assigned, it is applied with stricter severity in the common law than it was in that law;⁵ that is, the common law, in fact, makes the common carrier an insurer against all perils but those excepted.⁶

§ 151. Lord Holt, in the case of *Coggs v. Bernard*,⁷ is very explicit in stating the common-law doctrine which imposes upon a common carrier the extraordinary liability above mentioned, and in giving the reasons for it. "The law," says he, "charges this person (the carrier) thus intrusted to carry goods against all events but acts of God and enemies of the king. For though the force be never so great, as if an irresistible multitude of people

¹ Jones on Bailm. 103, referring to Doct. & Stud. Dial. 2, c. 38. See also Noy's Maxims, c. 43, p. 93; Abbott on Shipp. P. 3, c. 3, § 3, n. (1); Story on Bailm. § 489; 2 Kent, Com. 598.

² Jones, *sup.* 1 Inst. 88 a. Woodleif v. Curteis, 1 Rol. Abr. 2. Trent Navigation Co. v. Wood, 3 Esp. 127.

³ See authorities referred to, *ante*, § 148.

⁴ Jones, *ub. sup.*

⁵ Story on Bailm. § 490. 2 Kent, Com. 597, 598. De Rothschild v. Royal Mail Steam Packet Co. 7 Exch. 734; 14 Eng. L. & Eq. 327.

⁶ Forward v. Pittard, 4 T. R. 27. Hyde v. Trent Nav. Co. 5 T. R. 189.

⁷ Coggs v. Bernard, 2 Ld. Raym. 909.

should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c. ; and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded in that point."

§ 152. A learned English judge in modern times (Chief Justice Best) thus supports the views advanced by Lord Holt: "When goods," he observes, "are delivered to a carrier, they are usually no longer under the eye of the owner ; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants ; and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the king's enemies."¹

§ 153. The English books, it may be added, abound with strong cases, in which the above salutary rules have been enforced ; and the steady and firm support which the English courts of justice have uniformly and inflexibly given to them, without yielding to

¹ Riley v. Horne, 5 Bing. 217. And see *The Maria*, 4 Rob. Adm. 348. In *Lane v. Cotton*, Lord Holt says, though one may think it a hard case that a poor carrier that is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes, yet the inconvenience would be far more in-

tolerable if it were not so, for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of remedy to the party, and the law will not expose him to so great a temptation. 1 Vin. Abr. 219. Nelson, J., in *Orange County Bank v. Brown*, 9 Johns. 115.

the hardships of the particular case, has in our country met with unqualified approbation, and declared by the best authority worthy of admiration.¹ There is, indeed, no doubt but that in this country the doctrine of the English common law, which declares all common carriers, whether by land or water, liable for all losses as insurers except losses occurring from the two inevitable causes above mentioned, prevails generally as a part of the common law of the land.² Bronson, J., in delivering the opinion of the court in *Hollister v. Nowlen*,³ quotes the above opinions of Lord Holt and Chief Justice Best, with the view of showing that the law in relation to common carriers is simple, well defined, and, what is no less important, well understood; and in its vindication he says: "There is less hardship in the case of the carrier than has sometimes been supposed; for, while the law holds him to an extraordinary degree of diligence, and treats him as an insurer of the property, it allows him, like other insurers, to demand a premium proportioned to the hazards of his employment. The rule is founded upon a great principle of public policy; it has been approved by many generations of wise men; and if the courts were now at liberty to make, instead of declaring, the law, it may well be questioned whether they could devise a system which, on the whole, would operate more beneficially. I feel the more confident in this remark from the fact, that in Great Britain, after the courts had been perplexed for thirty years with various modifications of the law in relation to carriers, and when they had wandered too far to retrace their steps, the legislature finally interfered, and restored the salutary rule of the common law."⁴ Then there is

¹ 2 Kent, Com. 602.

² 2 Kent, Com. 609.

³ *Hollister v. Nowlen*, 19 Wend. 234. *Oakley v. Portsmouth Steam Packet Co.* 11 Exch. 618; 34 Eng. L. & Eq. 530.

⁴ The legislative interference to which the learned judge refers was in respect to limiting the carrier's responsibility by a general notice, as to which see *post*, Chap. VII. And see the opinion of the same learned judge in *Fairchild v. Slocum*, 19 Wend. 331; and in *Cole v. Goodwin*, 19 Wend. 251; and opinion of Cowen, J., 21 Wend.

198. The Supreme Court of Connecticut, in *Crosby v. Fitch*, 12 Conn. 419, says: "We are not dissatisfied with the reasons which originated the common-law responsibility of common carriers, and believe they apply with peculiar force at this day and in this country." And the doctrine was sternly enforced in Connecticut in the case of *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 539. In *Roberts v. Turner*, Spencer, J., said, the carrier is responsible as an insurer of the goods, "to prevent combinations, chicanery, and fraud." 12 Johns.

no hardship in enforcing any contract which is voluntarily made on a valuable consideration; and the assumption of the extraordinary responsibility by the carrier is in order that he may receive the freight. "In success, he may rejoice in the fortunate results of his adventurous and hazardous undertaking; in failure, he cannot complain that he is visited with the necessary consequence of adventure,—loss."¹

§ 154. First, then, as to what is meant by the "act of God." Sir William Jones considers that an expression more decent and proper than this, and also one more popular and conspicuous, is "inevitable accident."² But Lord Mansfield, in *Forward v. Pittard*,³ considers the carrier liable for "inevitable accident;" so that it seems that, according to the view of that learned judge,

232. Sergeant, J., in giving the opinion of the court in Pennsylvania, says the rule of the common law should not be relaxed. *Harrington v. M'Shane*, 2 Watts, 443. It is a principle (that the carrier is an insurer) say the Supreme Court of Pennsylvania, "of extraordinary responsibility, which has stood the test of experience and which we are unwilling to see frittered away." *Eagle v. White*, 6 Whart. 517. In a late case in Massachusetts, Hubbard, J., in giving the opinion of the court, remarked: "This law (the law making a common carrier an insurer) is enforced on principles of public policy, to prevent fraud and collusion with thieves and robbers; the owner of the goods, not being generally in a situation to oversee and protect his property, having placed it in the possession and under the protection of the carrier. . . And the pay of carriers is graduated upon such liability." *Thomas v. Boston R.* 10 Met. 476. See also *Orange County Bank v. Brown*, 9 Wend. 104; *De Mott v. Laraway*, 14 Wend. 255; *Atwood v. Reliance Trans. Co.* 9 Watts, 87; *Sheldon v. Robinson*, 7 N. H. 157; *Hastings v. Pepper*, 11 Pick. 42; *Moses v. Norris*, 4 N. H. 306; *Kemp*

v. Coughtry, 11 Johns. 109; *Spencer v. Daggett*, 2 Vt. 92; *Allen v. Sewall*, 2 Wend. 327; *Boyce v. Anderson*, 2 Pet. 150; *Backhouse v. Sneed*, 1 Murph. 173; *Walpole v. Bridges*, 5 Blackf. 173; *Pomeroy v. Donaldson*, 5 Misso. 36; *Swindler v. Hilliard*, 2 Rich. 286. Per Richardson, J., in delivering the opinion of the court, in *Reeves v. Waterman*, 2 Speer, 206: "It is in vain to arrange the principles that impose such strict accountability upon common carriers." Again: "The strict accountability of common carriers has been found necessary in all commercial communities, and has been the same for centuries; I might add, a successful carrying trade depends upon it." *Ibid.* And see also the opinion of Richardson, J., in *Steamboat Co. v. Bason*, Harper, 264; and the opinion of Nelson, J., in *New Jersey Steam. Nav. Co. v. Merchants' Bank*, 6 How. 344; *McHenry v. Railroad Co.* 4 Harring. Del. 448; *Cameron v. Rich*, 4 Strob. 168; *Jones v. Walker*, 5 Yerg. 457; *Thurman v. Wells*, 18 Barb. 514.

¹ See opinion of O'Neill, J., in *Smyrl v. Niolen*, 2 Bailey, 422.

² *Jones on Bailm.* 104, 105.

³ *Forward v. Pittard*, 1 T. R. 33.

the words "inevitable accident," which are preferred by some to the words "act of God," because more reverent, are not adequate to express the ground of a common carrier's excuse; for accidents arising from human force or fraud, are sometimes "inevitable."¹ (a) Again, in another case, Lord Mansfield says, the "act of God" is "natural necessity," and is distinct from "inevitable accident;" and as examples he mentions "winds and storms," which arise from natural causes,² and a "sudden gust of wind."³ The "act of God," therefore, in its legal sense, and as applied to common carriers, means something in opposition to the act of man, for every thing is the "act of God" that happens by his permission, every thing by his knowledge.⁴ Accident produced by any physical cause which is irresistible; such as a loss by lightning or storms, by the perils of the sea, by an inundation or earthquake, or by sudden death or illness, is mentioned by a learned author as the "act of God."⁵ To prevent litigation, the law presumes against a carrier in every case, except such act as could not happen by the intervention of human means.⁶ (b)

§ 155. The term *vis major* (superior force) is used in the civil law in the same way that the words "act of God" are used in the

¹ See opinion of Cowen, J., in *McArthur v. Sears*, 21 Wend. 192.

² *Trent Navigation Co. v. Wood*, 4 Doug. 280; 3 Esp. 127.

³ *Amies v. Stevens*, 1 Stra. 128.

⁴ *Forward v. Pittard*, *ub. sup.*

⁵ Story on Bailm. §§ 25, 511. "By the act of God," says the Superior Court of Errors and Appeals of Delaware, "is meant such inevitable accident as cannot be prevented by human care, skill, or foresight; but results

from natural causes, such as lightning and tempests, floods and inundation." *McHenry v. Railroad Co.* 4 Harring. 448.

⁶ Jeremy on Carr. 57. In the books, under the head of "waste," an analogous distinction is to be found; if a house fall down by tempest, or be burned by lightning, it is no waste, but burning by negligence or mischance is waste. Co. Litt. 53 a, b.

(a) See also *Merritt v. Earle*, 31 Barb. 38, 29 N. Y. 115; *Hays v. Kennedy*, 41 Penn. State, 378.

(b) *Merritt v. Earle*, 31 Barb. 38, 29 N. Y. 115. *Michaels v. New York R.* 30 N. Y. 564. In *Nugent v. Smith*, 1 C. P. D. 19, 34, Brett, J., speaking of the act of God, said: "The best form of the definition seems to us to be, that the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the defendant could not by any amount of ability foresee would happen, or, if he could foresee that it would happen, could not by any amount of care and skill resist, so as to prevent its effect." See, however, *S. C.* in the Court of Appeal, 1 C. P. D. 423.

common law,¹ and so also is the term *casus fortuitus*.² The latter term might, perhaps, have more properly been used by the court in *Colt v. M'Mechen*,³ in which the term "act of God" was applied to a sudden failure of the wind, whereby the vessel tacking was unable to change her tack, and so went ashore. "The sudden gust, in the case of the hoyman," said Spencer, J., alluding to the case of *Amies v. Stevens*,⁴ "and the sudden and entire failure of the wind, sufficient to enable the vessel to beat, are equally to be considered the acts of God. He caused the gust to blow in the one case, and in the other the wind was stayed by him."⁵

¹ Poth. Prét. a Usage, n. 48, 60.
² Bouv. Law Dict. 612. *M'Arthur v. Sears*, *ub. sup.* New Brunswick Steamboat Co. v. Tiers, 4 Zab. 697.

³ 3 Kent, Com. 217. Abbott on Shipp. c. 4, § 1. The "act of God" means natural accidents, such as lightning, earthquake, and tempest, and not accidents arising from the fault or negligence of man. *Jeremy on Carr.* 56. *Campbell v. Morse*, Harper, 468. *Harrell v. Owens*, 1 Dev. & B. 273. *Robertson v. Kennedy*, 2 Dana, 430. *Gordon v. Buchanan*, 5 Yerg. 32. *Turney v. Wilson*, 7 Yerg. 340. *Sprowl v. Kellar*, 4 Stew. & P. 382.

⁴ *Colt v. M'Mechen*, 6 Johns. 100.

⁵ *Amies v. Stevens*, *ub. sup.*

⁶ Mr. Wallace, in his note to *Coggs v. Bernard* (1 Smith's Lead. Cases, p. 233 of Am. ed. 1847), in commenting upon the above case of *Colt v. M'Mechen*, considers that the opinion of Mr. Justice Spencer may be very fair divinity; and that upon such a theological theory of causation, every thing may be the act of God. He then proceeds further to observe: "It is the most extraordinary version of the principle on which a common carrier is discharged from liability that the books contain, and upon the authority of later cases may confidently be pronounced to be wrong. Kent, C. J., in fact substantially dissented; for while he assented to the

theology of Spencer, J., that the stopping of the wind was the act of God, he thought there was a degree of negligence imputable to the master in sailing so near the shore under a light variable wind, that a failure, in coming about, would cast him aground. He ought to have exercised more caution, and guarded against such a probable event, &c.; in other words, he thought it not such an act of God as takes away the legal inference of negligence. The principle, so clearly and carefully ascertained in *M'Arthur v. Sears* (21 Wend. 160), controls both this case and *Williams v. Grant* (1 Conn. 487). The principle, that all human agency is to be excluded from creating, or entering into, the cause of mischief, in order that it may be deemed the act of God, shuts out those cases where the natural object in question is made a cause of mischief solely by the act of the captain in bringing his vessel into that particular position, where alone that natural object could cause the mischief; in the two cases in question, it was the act of the captain that imparted to the natural objects all the mischievous qualities they possessed; for rocks, shores, currents, and dying breezes are not by their own nature and inherently agents of mischief and causes of danger, as tempests, lightning, &c., are; the danger, therefore, sprang from human agency. It may

§ 156. A loss by fire, unless by lightning, is a loss not in opposition to the act of man, and therefore the general law is clear, that a common carrier is in all common cases an insurer against such fire.¹ In an action against a common carrier for not safely carrying and delivering goods, the goods, which were hops, were burnt whilst in a booth, under the defendant's care; and although the fire began a hundred yards distant, and without any negligence whatever being proved in the defendant, it was held, that there were certain events for which the carrier is liable, independent of his contract; a further degree of responsibility by the custom of the realm; for by the common law, he is in the nature of an insurer; and as the fire arose from some act of man, the carrier is liable in this case. The law presumes against the carrier, unless he shows the injury could not happen by the intervention of man.² (a) Thus, in this case, Lord Mansfield delivered the unanimous opinion of the King's Bench in favor, it has been asserted, "of a great principle of public policy, which has proved to be of eminent value to the morals and commerce of the nation in succeeding generations."³

be thought that in principle the distinction does not amount to much, for that the carrier is always liable for his own negligence, and it is easy to see that such accidents can never prove fatal without negligence on his part. But practically the distinction is of the first importance, because it affects the burden of proof; and the confusion of the distinction tends to thwart the wise provision of the common law, which will not allow the carrier to throw upon the employer the burden of proving or inferring negligence or defective means in the carrier, until he has shown the intervention of such an extraordinary, violent, and destructive agent, as by its very nature raises a presumption that no human means could resist its

effect. Upon the whole, it would seem that the act of God signifies the extraordinary violence of nature."

¹ Per Dallas, C. J., in *Thorogood v. Marsh*, 1 Gow, 105.

² *Forward v. Pittard*, 1 T. R. 27. In *Hyde v. Trent Navigation Co.* 5 T. R. 389, common carriers from A to B, charged and received cartage of goods to the consignee's house at B, from a warehouse there, where they usually unloaded, but which did not belong to them. It was held, that they must answer for the goods if destroyed in the warehouse by an accidental fire.

³ 2 Kent, Com. 602. The act 26 Geo. 3, c. 86, § 2, limiting the responsibility of ship-owners for a loss occasioned by fire, does not extend to

(a) *Moore v. Michigan R.* 3 Mich. 23. *Cox v. Peterson*, 30 Ala. 608. *Chevallier v. Straham*, 2 Texas, 115. In *Miller v. Steam Nav. Co.* 6 Seld. 431, the carrier was held liable for a loss by fire, although the proximate cause of the loss was the driving of the fire from a distance to the goods by a sudden gust of wind.

§ 157. Therefore, as carriers by water, whether inland or foreign, are liable as common carriers, in all the strictness and extent of the common-law rule,¹ (a) the owners of carrier vessels must be answerable for a loss by fire proceeding from any other cause than that of lightning, and whether originally commencing in their own vessel, or, according to the above case of *Forward v. Pittard*, communicated to it from another.² As was said by Richardson, J., in *Steamboat Company v. Bason*,³ (*exempli gratia*) how easy would it be to rob a steamboat, and then raise the appearance of an accidental loss by fire. The court, then, in a case in Mississippi, had all sufficient ground for deciding, as they did, that a loss occasioned by accidental fire, though not arising from negligence or carelessness, was not within the exception of a loss caused by the "act of God."⁴

§ 158. It was, however, contended in the Supreme Court of Connecticut, in the case of *Hale v. New Jersey Steam Navigation Company*, that there was no case where the liability of the carrier is extended to fire on the high seas. But if the principle governs such cases, then the court thought, it is to be supposed, the reason such cases are not to be found, is, that they have not occurred, or were not contested; and if the carrier is subjected for the loss of goods burnt on land, where he was in no fault, the court saw no reason for exempting the carrier at sea, under like

the case of a fire happening on board a lighter employed in carrying goods from the shore to be loaded on board of a ship. *Morewood v. Pollok*, 1 Ellis & B. 743; 18 Eng. L. & Eq. 341.

¹ *Ante*, §§ 79, 80, 87, 88.

² *Abbott on Shipp.* P. 4, c. 6, p. 389. *Parker v. Flagg*, 13 Maine, 181.

³ *Steamboat Company v. Bason*, Harper, 264.

⁴ *Gilmore v. Carman*, 1 Smedes & M. 279. And see *Harrington v. M'Shane*, 2 Watts, 443. The Su-

preme Court of Alabama have ruled, on two occasions, that acts of God, which constitute a legal excuse for the loss of or damage to goods, by the sinking or destruction of a steamboat, must appear to be the immediate, not the remote, cause of the loss or damage; and must be beyond the prevention or control of human prudence. *Jones v. Pitcher*, 3 Stew. & P. 135. *Sprowl v. Kellar*, 4 Stew. & P. 382. *McCall v. Brook*, 5 Strob. 119. (b)

(a) See cases cited *ante*, § 90.

(b) A severe storm producing an unusually low tide, and causing a carrier's barge to strike against a timber projecting from the wharf, so low as in ordinary tides to be no cause of injury, will not excuse the carrier for the loss of goods occasioned by the timber piercing the vessel. *New Brunswick Steamboat Co. v. Tiers*, 4 Zab. 697.

circumstances. In this case, the plaintiff claimed, that, on the 10th of January, 1840, the defendants, being owners of the steamboat "Lexington," which had for several years been one of the line of boats transporting goods for hire from New York to Stonington and Providence, for all persons who chose to employ them, undertook to transport two carriages belonging to the plaintiff to Boston, or to Providence, on the way to Boston; that on the night of the 10th of January, said boat, on her passage from New York, in Long Island Sound, near Huntingdon, was destroyed by fire, together with said carriages; and the plaintiff claimed to recover of the defendants, as common carriers, for the value of the carriages, upon the ground that they were not destroyed by the act of God or the public enemy. He was sustained in this ground by the court, who held the defendants liable.¹

§ 159. In *Patton v. Magrath*, it was argued, that the navigation of steamboats being caused by fire, made them so liable to destruction by that element, that this danger ought to be classed as the act of God. But Richardson, J., in speaking for the court, said, in reply to this argument, that "the loss by fire, which, occurring in another boat, renders the owners liable, will, in like manner, make liable the owners of a steamboat propelled by fire." But he added, that the owners would not be liable if by a public notice they declared they would not be liable in such an event; or if the bill of lading expressed, that they would not be liable for accidents by fire.² Thus, in other words, saying, that the owners might divest themselves of their responsibility in such an event, by special contract, a subject which will receive attention in a subsequent chapter. In a later case, in South Carolina, which was an action for the loss by fire of a number of bales of cotton on board the defendant's boat, the court, in giving their opinion, said, that if there is neither usage nor special contract to protect or exempt the defendants from the general liability of common carriers for such losses, then the plaintiff's case would be too plain for a difference of opinion. And the court added,

¹ *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 539. See also *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344.

² *Patton v. Magrath*, Dudley, S. C. 159, recognized and approved in *Swindler v. Hilliard*, 2 Rich. 286.

that, upon the well-established principles of the law of common carriers, the defendants were liable for all such losses by fire.¹

§ 160. The freezing of our canals, rivers, and arms of the sea, on the other hand, is not an interposition of human agency, but is an interposition of the *vis major*, and such an one as excuses a loss arising from the delay of a common carrier by water. But the carrier is nevertheless bound to exercise ordinary forecast in anticipating the obstruction; must use proper means to overcome it; exercise due diligence to accomplish the transportation he has undertaken as soon as the obstruction ceases to operate; and, in the mean time, must not be guilty of negligence in the care of the property;² (a) nor deviate from the course of the voyage prescribed, for the reason of the obstruction by ice.³ The owners of a vessel lying in the river undertook to carry goods from Norwich to New London, and in the passage the river was obstructed by ice, which was formed during the night next preceding the sailing of the vessel from Norwich, whereby the vessel was injured and became leaky, and the goods were spoiled. It was held that the owners of the vessel were liable as common carriers. But, in this case, negligence and insufficiency of the vessel were charged upon the defendants, and the verdict of the jury was for the plaintiff, though they were instructed by the court, that the defendants were not liable as common carriers for injuries arising by the act of God.⁴ (b)

§ 161. In a case against a carrier for an injury done to a cargo by steam, it appeared that the steam escaped through a crack in the steam-boiler, occasioned by the frost (the *vis major*); and the court held, that at that season of the year, in which such injuries by frost are likely to occur, it is gross negligence in the carrier

¹ Singleton v. Hilliard, 1 Strob. Harris v. Rand, 4 N. H. 259. And see Wallace v. Vigus, 4 Blackf. 260.

² Bowman v. Teall, 23 Wend. 306. ³ Hand v. Baynes, 4 Whart. 204. Parsons v. Hardy, 14 Wend. 215. Crosby v. Fitch, 12 Conn. 410.

⁴ Richards v. Gilbert, 5 Day, 415.

(a) See The Maggie Hammond, 9 Wall. 435; West v. Steamboat Berlin, 3 Iowa, 532.

(b) If goods are injured by freezing, the carrier is liable if he could have prevented them from freezing by the exercise of due care and diligence. Wing v. New York R. 1 Hilton, 235. See Swetland v. Boston & Albany R. 102 Mass. 276.

to fill up his boiler over-night, without keeping up a suitable fire to prevent such accidents.¹ Here also was the "intervention of man," viz., the misconduct and negligence of the carrier. (a)

§ 162. The defendant allowed his wagon, in which he was carrying goods, to stick fast in a fording creek, and the water suddenly rising, damaged the goods; and he was held liable for the damage.² The damage was from the act and negligence of man; and if a common carrier "goes by ways that be dangerous, he shall stand charged for his misdemeanor;" and so, "if he overcharge a horse, whereby he falleth into the water, or otherwise so that his stuff is hurt or impaired, then he shall stand charged for his misdemeanor;" and so, "if he drive by night, or in other inconvenient time."³

§ 163. If the goods have been wetted, destroyed, or swept away by rains and floods, the circumstances attendant thereupon must be regarded, in order to determine whether it has been occasioned by the act of God, or the act, misconduct, or negligence of man. (b) A common carrier undertook to transport, both by land and by water, a quantity of flour from Baltimore to Philadelphia, and at an intermediate part of the route the flour was put upon an elevated place on a wharf, wholly uncovered and unprotected from the weather; and while it lay there a freshet arose, by which a great part of the flour thus exposed was swept off. In an action to recover damages, the defendants insisted that the loss was by the act of God, and urged in their defence, their inability to procure warehouse-room for the storage of the flour, owing to the great quantity of commodities transported along the line, in consequence of the coasting trade being

¹ *Siordet v. Hall*, 4 Bing. 607. *Noy's Maxims*, c. 43. *Boyle v.*

² *Campbell v. Morse*, Harper, 468. *M'Laughlin*, 4 Harris & J. 291.

³ *Doct. & Stud. Dial.* 2, c. 38.

(a) A carrier is liable for a loss caused by the explosion of a steam-boiler. *Bulkley v. Naumkeag Steam Cotton Co.* 24 How. 386; *S. C. nom.* *The Bark Edwin*, 1 Sprague, 477. *The Mohawk*, 8 Wall. 153.

(b) In *Philleo v. Sanford*, 17 Texas, 227, it is said: "It cannot be pretended that goods may not be conveyed securely in a covered wagon, without being exposed to injury from rain; and he who undertakes their transportation in this mode as a common carrier insures their carriage securely and without injury from any such cause." See *Klauber v. American Exp. Co.* 21 Wis. 21.

cut off by the public enemy. But the court held the defendants liable for the loss so sustained, because they knew the state of public affairs, and it was in consequence of which the line of communication in question was established, and from the same cause it became unusually crowded and profitable; because the defendants knew, or were bound to know, the extent and capacity of their means of transportation, and because the sufficient capacity of their warehouses at the point where the loss happened they undertook for, and consequently insured.¹ (a)

§ 164. A wagoner undertook to carry and deliver certain packages of merchandise which he received in Cincinnati to a person in Crawfordsville in Indiana, and in an action against him for an injury done to the goods, it was proved, that he left the direct and principal road from the one place to the other, taking a more circuitous one which led past his own dwelling; that after the defendant had so deviated from the usual route, he drove on to a bridge which gave way, thereby upsetting the wagon, and throwing the goods into the water, whereby they were injured. It also appeared in evidence, that the bridge was considered safe before the accident; that the road taken by the defendant was preferred by some to the more direct and more generally travelled way to Crawfordsville, but wagoners never used it. The court held the carrier responsible for the damage, unless he stood excused on the score of inevitable accident; which, the court said, was so far from being the case, that the accident happened in consequence of his own improper conduct; and a desire to go to his own house, which was his inducement to deviate, was no legal excuse for his doing so.² (b) So, if a carrier takes the

¹ Boyle v. M'Laughlin, 4 Harris 497. And see Davis v. Garrett, 6 & J. 291.

² Powers v. Davenport, 7 Blackf.

(a) In Read v. Spaulding, 5 Bosw. 395, 30 N. Y. 630, the goods were damaged by an extraordinarily high tide at Albany. There had been great delay in the transportation of the goods, and if proper care had been used the goods would have been beyond Albany at the time of the flood. The carrier was held liable, on the ground that the delay was similar in effect to a deviation, and rendered the carrier liable as an insurer. See *contra*, Denny v. New York R. 13 Gray, 481; Hoadley v. Northern Transp. Co. 115 Mass. 304; Morrison v. Davis, 20 Penn. State, 171; Railroad Co. v. Reeves, 10 Wall. 176. Compare Holladay v. Kennard, 12 Wall. 254.

(b) See The Schooner Sarah, 2 Sprague, 31.

most dangerous of two modes of conveyance around a fall, he does so at his own risk.¹

§ 165. Ferryman, if they venture out at an improper season, are most unquestionably liable; but if a sudden gust of wind or storm arise, and an injury is sustained, after the ferryman is under way, then it is clear the law will not charge him; because man cannot always foresee storms and tempests, and guard against them.² The defendant kept a ferry across the Missouri River, and the plaintiff applied to cross the river. The ferry-boat was brought to the bank, and fastened by a chain to a stake driven into the bank, and the driver of the plaintiff's wagon was directed to drive into the boat. The horses entered and drew in the fore wheels of the wagon; but when the hind wheels struck the boat, the stake was broken, and the boat receded from the shore, the hind wheels of the wagon being out over the end of the boat. The driver, being urged thereto by several persons on the shore, dismounted and cut his fore horses loose from the wagon, and backed the wagon out of the boat into the water. One of the hind horses was drowned, and it was held, the loss was not occasioned by the act of God. In this case the jury found, that by the negligence of the ferryman he had caused the accident to happen, and that he thereby produced the state of alarm in which the driver imprudently backed his wagon into the river. The court said, that neither the plaintiff nor the driver of his wagon could be supposed to have the same presence of mind on such an occasion as the ferryman.³

§ 166. Carriers by water have, from a very early period, been in the habit of making special acceptances of goods to be carried for hire, and guarding themselves by the bill of lading or contract of affreightment, from losses occasioned by "perils of the seas." These words certainly denote the natural accidents peculiar to

¹ *Lawrence v. M'Gregor, Wright*, 193.

² *Cook v. Gourdin*, 2 Nott & McC. 19.

³ *Pomeroy v. Donaldson*, 4 Misso. 36. In the Year Books (22 Ass. 41), there is the case of an action against a waterman for overloading his boat, so that the plaintiff's horse was drowned. It was agreed, "that if he had not

surcharged the boat, although the horse was drowned, no action lies, notwithstanding the assumpsit; but if he surcharged the boat, otherwise; for there is default and negligence in the party." The court said: "It seemed, that you trespassed when you surcharged the boat, by which the horse perished." 1 Roll. Abr. 10, pl. 18.

that element, and from losses thereby occasioned, the common carrier by water is, and always has been, exempt by the common law.¹ (a) As if, for example, a carrier vessel is taken in tow by a ship of war, and in order to keep up she is obliged to have recourse to an extraordinary press of sail in a gale of wind, and thereby her cargo is injured, it is a loss by the perils of the sea.² But what is the precise import of this phrase is not, perhaps, exactly settled. It has been supposed, that by these words are properly meant no other than inevitable perils or accidents upon that element, and that they are but commensurate with the words "acts of God."³ But, notwithstanding this opinion, the words "perils of the sea" have been held to extend to events not attributable to natural causes.⁴ They have been held to include losses by pirates,⁵ and also losses by collision of two vessels where no blame is imputable

¹ Abbott on Shipp. 5th Am. ed., p. 470. Story on Bailm. § 512. And, that the words "perils of the sea" apply to all those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man cannot foresee, nor his strength resist. See 3 Kent, Com. 300; *Blythe v. Marsh*, 1 McCord, 360; and *post*, § 226.

² *Hagedorn v. Whitmore*, 1 Stark. 157.

³ *Williams v. Grant*, 1 Conn. 487. *Crosby v. Fitch*, 12 Conn. 410.

⁴ Story on Bailm. § 512. See cases arising under the clause in a bill of lading "except the perils or dangers of the rivers or lakes," considered and commented upon by Cowen, J., in *M'Arthur v. Sears*, 21 Wend. 198, 199.

⁵ Abbott on Shipp. 5th Am. ed. p. 474. Story on Bailm. § 512. *Pickering v. Barclay*, 2 Roll. Abr. 248. *Barton v. Wolliford*, Comb. 56.

(a) Fire is not within the exception "perils of the sea," or "dangers of the river." *Morewood v. Pollok*, 1 Ellis & B. 743: 18 Eng. L. & Eq. 341. *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344. *Garrison v. Memphis Ins. Co.* 19 How. 312. *Airey v. Merrill*, 2 Curtis, 8. *Cox v. Peterson*, 30 Ala. 608. In Alabama, parol evidence of a usage that fire is considered a danger of the river within the exception in a bill of lading is admissible. *Sampson v. Gazzam*, 6 Port. Ala. 123. *Ezell v. Miller*, 6 Port. Ala. 307. *Ezell v. English*, 6 Port. Ala. 311. *Hibler v. McCartney*, 31 Ala. 501. If goods properly stowed are damaged by sweat, that is, by the condensation of moisture occasioned by passing from a warm to a cold climate, the loss is by a peril of the sea, and the carrier is not liable. *Clark v. Barnwell*, 12 How. 272. *Lamb v. Parkman*, 1 Sprague, 343. *Baxter v. Leland*, Abbott, Adm. 348. *Zerega v. Poppe*, Abbott, Adm. 397. *McKinlay v. Morrish*, 21 How. 343. If goods are not properly stowed, the carrier is liable; and, although the bill of lading says nothing as to the place of stowage, a usage of the trade may be shown to stow such goods in a particular part of the vessel. *The Star of Hope*, 17 Wall. 651.

to the injured ship.¹(a) In a case arising upon a policy of insurance, wherein the loss happened by collision without any neglect or fault on the part of the ship insured, and was so specially alleged in the declaration, the underwriters were held answerable, and Mansfield, C. J., said: "I do not know how to make this out not to be a peril of the sea. What drove the "Margaret" against the "Helena" (the ship insured)? the sea; what was the cause that the crew of the other ship did not prevent her from running against the "Helena"? their gross and culpable negligence; but still the sea did the mischief."² In a case in South Carolina, the court considered that all accidents or misfortunes to which those engaged in maritime adventures are exposed must undoubtedly be said to arise from perils of the sea; but in modern times it has been found convenient to distinguish the losses to which ships and goods at sea are liable, by the more immediate causes to which they may be more particularly ascribed. In this view, losses by perils of the sea are now restricted to such accidents or misfortunes only as proceed from mere sea damage, that is, such as arise *ex vi divina*, from stress of weather, winds, waves, lightning, tempest, rocks, sands, &c.³ In a case wherein it appeared

¹ Story on Bailm. § 512. Abbott on Shipp. *ub. sup.*

² Smith v. Scott, 4 Taunt. 126. The words "perils of the sea," though generally referable to accidents peculiar to that element, are sometimes extended to a capture by pirates, or to collision of vessels when no blame attaches to either, but more especially to the one injured. Jones v. Pitcher, 3 Stew. & P. 176.

³ See opinion of the court in Blythe v. Marsh, 1 McCord, 360. In this

case, two vessels, the "None-Such" and the "Planters' Friend," were passing in a narrow channel between Georgetown and Charleston, about four hundred yards across, both going the same way; the "None-Such" ahead, going at the rate of seven knots, and the "Planters' Friend" coming up full in the wind at the rate of seven knots. The captain of the "Planters' Friend" was warned of the danger, but thinking he could clear his vessel, in attempting to pass,

(a) If the collision is caused by the fault of the carrier ship, it is not a peril of the seas. Lloyd v. Gen. Iron Screw Collier Co. 3 H. & C. 284. Grill v. Gen. Iron Screw Collier Co. L. R. 1 C. P. 600; affirmed in Exch. Ch. L. R. 3 C. P. 476. If the carrier vessel is sunk by a collision and the goods lost, through the fault of those on board, it is no defence to an action by the owner of the goods that the colliding vessel was also in fault. Converse v. Brainerd, 27 Conn. 607. In Hays v. Kennedy, 41 Penn. State, 378, the bill of lading excepted "the unavoidable dangers of the river, navigation, and fire." Held, that the carrier was not liable for the loss by collision of goods on his vessel, the master and crew of his vessel not being in fault.

that a ship was hove down on a beach within the tide-way, for the purpose of repairing, and the tide having carried away the shores by which she was supported, her side and some of her timbers were injured, the damage was considered as having happened on the land, and hence not to be a loss by the "perils of the sea."¹

§ 167. But the phrase "perils of the sea," whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense, as including unavoidable accidents upon that element, must in either case be understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence.² Hence it is, that if a loss occurs by a peril of the sea, which might have been avoided by the exercise of any reasonable skill or diligence, at the time when it occurred, it is not to be deemed, in the sense of the phrase, such a loss by the "perils of the sea" as will exempt the carrier from liability; but rather a loss by the negligence of the party.³

came in contact with the "None-Such," and sunk her. In an action brought by the owner of a quantity of rice shipped on board the "None-Such," which was lost, upon a bill of lading in the usual form, "excepting the dangers of the sea," it was held that the collision was the result of negligence, in the management of one or both the vessels, and that the owners of the "None-Such" were in either case liable to the shipper. A collision which would excuse the carrier must be such as could not be avoided by human prudence and skill.

¹ *Thompson v. Whitmore*, 3 Taunt. 227.

² Opinion of Story, J., in *The Schooner Reeside*, 2 Sumn. 571. *Abbott on Shipp.* P. 9, c. 4, § 1. 3 Kent, Com. 216, 217. *Elliot v. Rosell*, 10 Johns. 1.

³ *Ibid.* Story on Bailm. § 512 *a*. Where the claim of the defendant in

an action against him for an injury to the plaintiff's steamboat, was, that the injury complained of was occasioned by the neglect of the officers and crew of such boat to keep up lights, according to the statute; and the court charged the jury, that if such officers and crew were guilty of negligence, either in respect to said lights, or otherwise, to such a degree as essentially to contribute to the injury complained of, the plaintiff could not recover; it was held, after a verdict for the plaintiff, that the charge was unexceptionable. *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420. The charge to the court, in this case, is very similar to the charge of the court in the case of *Sills v. Brown*, 9 Car. & P. 661, in which Coleridge, J., told the jury that "if the plaintiff's servants substantially contributed to the injury, by their improper or negligent conduct, the defendant

§ 168. The import of the phrase “dangers of the river,” (*a*) like that of “perils of the sea,” is not, perhaps, very exactly settled; although a just understanding of the meaning and effects of the exception in a bill of lading of the “dangers of the river” is of peculiar importance in this country, as it extensively affects, for the reason of the great number and magnitude of our navigable rivers, the commercial interests and pursuits of the whole community. The point has received the particular attention of the Supreme Court of Alabama, a State than which few others afford greater facilities to inland water transportation, with its numerous navigable streams intersecting almost every county. A consequence of these facilities peculiar to the country generally, though more so in respect to some States than to others, is, that a large portion of the people, instead of providing means of their own, have adopted the practice of intrusting to public carriers an unusual proportion of products and merchandise. There seems to be no disposition in the Supreme Court of Alabama,¹ to make any distinction between “dangers of the river” and “dangers of the sea;” and in the case referred to, the court considered, that “the perils of the sea, and of the river,” are so nearly allied, that they may be considered the same, except in the few instances in which the reason differs. That there is a settled distinction be-

would be entitled to their verdict; but if the injury was occasioned by the improper or negligent conduct of the defendant's servants, and the plaintiff's servants did not substantially contribute to produce it, then the plaintiff would be entitled to their verdict.” The principle involved in both cases is, that while, on the one hand, a party shall not recover damages for an injury which he has brought upon himself, neither shall he be permitted to shield himself from an injury which he has committed, because the party injured was in the wrong, unless such wrong contributed to produce the injury; and even then,

it would seem, a party is bound to use common and ordinary caution to be in the right. Per *Hinman, J.*, in *New Haven Steamboat Co.*, *ub. sup.* The question of fair or improper conduct in these cases is left to the determination of the jury. 2 *Greenl. Ev.* § 220. *Williams v. Holland*, 6 *Car. & P.* 23. *Batson v. Donovan*, 4 *B. & Ald.* 21. *Pluckwell v. Wilson*, 5 *Car. & P.* 375.

¹ *Jones v. Pitcher*, 3 *Stew. & P.* 135, 176. And see *Whitesides v. Russell*, 8 *Watts & S.* 44; *M'Gregor v. Kilgore*, 6 *Ohio*, 143; *Dunseth v. Wade*, 2 *Scam.* 285.

(*a*) In *Transportation Co. v. Downer*, 11 *Wall.* 129, the expression “dangers of lake navigation” was held to include all the ordinary perils which attend navigation on the lakes, and among others that which arises from shoal waters at the entrance of harbors.

tween perils of the "navigation" and the "act of God," in bills of lading, is considered to be settled, and that the bill of lading may, in transportation by water, introduce exceptions not existing by the common law,¹ which seems to be asserted in *Aymar v. Astor*.² In *Johnson v. Friar*,³ it was held, that the expression, dangers of the river excepted, in bills of lading, meant only such as no human skill or foresight could have guarded against. In other words, it means all unavoidable accidents, for which common carriers by the general law are not excused, unless they arise from the "act of God." The distinction in *Gordon v. Buchanan*⁴ is expressly taken, for in that case it is said, that the act of God "means disasters with which the agency of man has nothing to do, such as lightning, tempests, and the like." The "perils of the river" includes something more. "Many disasters, which would not come within the definition of the act of God, would fall within the exception in this receipt. Such, for instance, as losses occasioned by hidden obstructions in the river newly placed there, and of a character that human skill or foresight could not have discovered and avoided." In *Williams v. Branson*,⁵ it is held, that the words "dangers of the river," in the bill of lading, "signify the natural accidents incident to the navigation, not such as might be avoided by the exercise of that discretion and foresight which are expected from persons in such employment;" and that to ascertain whether the loss was by such "dangers," it must be inquired whether the accident arose through want of proper foresight and prudence. If a steamboat on the Ohio River run upon a stone and knock a hole in her bottom, the carrier will not be discharged from liability by virtue of the clause in his bill of lading, "the dangers of the river only excepted;" but, in order to relieve himself from responsibility, it is incumbent upon him to prove that due diligence and proper

¹ By Mr. Wallace, in his note to the case of *Coggs v. Bernard*, 1 Smith Lead. Cas. (Am. edit. 1847), p. 232.

² *Aymar v. Astor*, 6 Cow. 206. And see *post*, Chap. VII.

³ *Johnson v. Friar*, 4 Yerg. 48.

⁴ *Gordon v. Buchanan*, 5 Yerg. 72. See also this case, and the one preceding it, confirmed in *Turney v. Wilson*, 7 Yerg. 340.

⁵ *Williams v. Branson*, 1 Murph. 417. In *Marsh v. Blyth*, 1 Nott & McC. 170, the point is the same; the meaning of the act of God was not in question, and the point decided was, that to determine whether the cause of the loss was by a "peril of the sea," the existence or non-existence of negligence was to be tried by the jury.

skill were used to avoid the accident, and that it was unavoidable.¹ (a)

§ 169. The decision in *Dale v. Hall*² has been considered to furnish a good illustration of the general principle by which the master and owners of a vessel are held responsible for every injury occurring to a vessel that might have been prevented by human foresight or care;³ and that by a "peril of the sea" is meant a natural, and not merely an inevitable accident. Though the question presented in this case may seem ludicrous, yet the extent of actual injury, and the importance of the legal principle involved, have rendered it one of very considerable discussion. The question was, whether a damage done to a ship by rats was among the casualties comprehended under the general phrase "perils of the seas." The decision was made as long since as the year 1750 (24 Geo. II.), and is stated, and briefly commented on, in the following manner, by Sir William Jones:⁴ "In a recent case," says he, "of an action against a carrier, it was holden to be no excuse that the ship was tight when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole, through which the water had gushed." He then adds, that the true reason of the decision is not mentioned by the reporter; it was, says he, in fact, at least ordinary negligence to let a rat do such mischief in the vessel; and that, on this principle, the Roman law had decided, that "*si fullo vestimenta polienda acceperit, eaque mures roserint, ex locatur tenetur, quia debuit ab hac re cavere.*"⁵ Now it seems singular, that Sir William Jones should endeavor to explain the decision on such ground, because the defendant positively proved, that he had taken all possible care, and was guilty of no negligence; and, indeed, on that very

¹ *Whitesides v. Russell*, 8 Watts & S. 44.

² *Dale v. Hall*, 1 Wils. 281.

³ *Abbott on Shipp.* p. 371. And see also 3 Kent, Com. 300.

⁴ *Jones on Bailm.* 105.

⁵ Dig. 19, 2, 13, 6.

(a) See *The Lady Pike*, 21 Wall. 1; *The Mohler*, 21 Wall. 230; *Hill v. Sturgeon*, 28 Misso. 323; *Hays v. Kennedy*, 41 Penn. State, 378. In *Cox v. Peterson*, 30 Ala. 608, the action was for non-delivery of goods shipped on a steamboat under a contract excepting "dangers of the river." In consequence of low water, the steamboat was obliged to stop before reaching its port of destination, and the goods were stored in a warehouse where they were destroyed by fire. The carrier was held liable, and evidence of a custom to exonerate him in such a case was rejected.

account (it will appear on examination of the case) the jury gave a verdict in his favor. The decision, therefore, sustains the policy of the law of common carriers, which supposes that there may be negligence, though impossible to be detected, and which renders the carrier liable, unless the loss can be clearly referred to that particular kind of peril of the sea called the "act of God," or "*vis major*."¹(a) It supports the principle, that, although ordinary care excuses a warehouseman, it is not sufficient to excuse a common carrier.² Lord Ellenborough treated the question, whether damage done to a vessel by rats is a peril of the sea, as one about which he considered there was no doubt. It came before him in an action on a policy of insurance, in which it appeared, that the ship was detained at an intermediate port, and that, while lying there, the rats, which had increased to a great extent, ate holes in her transoms, and other parts of her bottom; in consequence of which a survey was called, when she was found so much injured that she was unfit to proceed on her voyage. Being thereupon condemned, the plaintiff sought to recover a loss; but Lord Ellenborough was clearly of opinion, that this was not a loss within any of the perils insured against.³

§ 170. In *Aymar v. Astor*, in New York,⁴ the latter party brought assumpsit against the former, for the value of certain bear-skins shipped on board the defendant's vessel at New Or-

¹ Opinion of Harper, J., in *Ewart v. Street*, 2 Bailey, 161. And see Law Rep. for January, 1853, p. 566.

² In *Califf v. Danvers*, Peake, 113, which was an action against a warehouseman, for negligently keeping a quantity of ginseng, which rats had got at and destroyed, although every precaution had been taken, Lord Kenyon said: "That a warehouseman was only obliged to exert reasonable diligence in taking care of things deposited in his warehouse. That he was not to be considered, like a carrier, as an insurer; and that the defendant in this case, having

exerted all due and common diligence for the preservation of the commodity, was not liable to any action for this damage, which he could not prevent." *S. C.* cited in *Jeremy on Carr.* p. 91, note (l).

³ *Hunter v. Potts*, 4 Camp. 203. Baron Alderson, in giving judgment, has said, that a rat in making a hole in a ship may be the same thing as if a sailor made one. *Laveroni v. Drury*, 8 Exch. 166; 16 Eng. L. & Eq. 510. See *Oakley v. Steam Packet Co.*, 11 Exch. 618, 34 Eng. L. & Eq. 530.

⁴ *Aymar v. Astor*, 6 Cow. 266.

(a) A carrier is liable for damage done to goods by rats, although he has used every possible precaution to keep the rats out. *Kay v. Wheeler*, L. R. 2 C. P. 302.

leans, for New York, but which were destroyed by rats on the voyage. By the bill of lading, signed by the master, the receipt of the bear-skins was acknowledged, to be delivered in good order and well-conditioned to the plaintiff in New York, "the dangers of the seas" and of "capture" only excepted. When they were delivered in New York they were damaged by rats; and the parties went into evidence in the court below upon the question whether the vessel was prudently managed for the avoiding of rats, or whether the master had been negligent in that respect. The defendants offered to prove that both at New Orleans and at New York damage by rats was considered and treated, by the usage of trade and merchants, as a peril of the sea. The court below excluded the evidence, and the defendants excepted. The court charged the jury that damage done by rats was not a peril by the sea, and the defendants excepted. The verdict and judgment in the court below was for the plaintiff. *Savage, C. J.*, said: "As to the question of liability, independent of the evidence offered, the terms 'perils of the sea,' as used in contracts of insurance, do not include those losses which may be prevented by proper care:" and he cited the above cases of *Dale v. Hall*, and *Hunter v. Potts*. *Woodworth and Sutherland, JJ.*, upon this point agreed with the Chief Justice, but differed from him by their agreeing with the court below, that evidence of mercantile usage and understanding at New Orleans and New York, that injuries by rats are considered and treated as "perils of the sea," was inadmissible.¹ The case of *Garrigues v. Coxe*, in Pennsylvania,² which was on a policy of insurance, the destruction of goods at sea by rats was held, on the other hand, to be a loss by a peril of the sea, where there had been no default of the carrier; but this has been considered and pronounced to be the only case contrary to the doctrine, as above established as the common-law doctrine, that the damage so occasioned is not a damage by a peril of the sea.³ As

¹ The judgment was reversed, on the ground that the court erred in charging the jury that the defendants below were common carriers. That this ground is opposed to general authority, see *ante*, § 80.

² *Garrigues v. Coxe*, 1 Binn. 592.

³ 3 Kent, Com. p. 300, in a note to which page it is also said, that the

better opinion is, that the insurer is not liable for damage done by rats, because it arises from the negligence of the common carrier, and it may be prevented by due care, and is within the control of human prudence and sagacity; and the authorities cited by the learned author, besides the above cases of *Dale v. Hall*, *Hunter*

was affirmed by Harper, J., in *Ewart v. Street*, in South Carolina,¹ in illustrating the responsibility of common carriers, "in all cases of injury to vessels from the gnawing of rats, the injury originates from causes that may be foreseen, or from the agency of man."

§ 171. A very strong case, in support of the principle of law, as applied to common carriers by water, that "perils of the sea" denote natural accidents peculiar to that element, and that they should not be understood to include accidents merely because they occur upon that element, is the case of *Backhouse v. Sneed*, in North Carolina:² A, being the owner of a vessel lately completely repaired, received corn on board on freight; the rudder was broken by the force of the sea, and the corn in consequence lost. The rudder proved to be internally rotten, although it presented an external appearance of soundness; and the fact of rottenness was unknown to A. It was held that A was liable for the loss of the corn. The opinion of the court was delivered by Taylor, J., who affirmed that all accidents which can occur by the intervention of man, however irresistible they may be, the carrier is considered as insuring against; and he relied, in support of this doctrine, upon the opinion of Lord Mansfield, in *Forward v. Pittard*, and upon that of the court in *Dale v. Hall*.

§ 172. Where a vessel is so eaten by worms as to be unfit to prosecute the voyage, it is held not to be a loss within the perils of the sea. In the case of *Rohl v. Parr*³ (an action on a policy of insurance), a vessel insured to the coast of Africa, there and back, had been wholly destroyed by the worms common to the rivers of

v. Potts, and *Aymar v. Astor*, are *Roccus de Ass. n. 49*; *Cleirac sur le Guidon, c. 5, art. 8*; *Emerigon, tom. i. 377*, who cites the *Dig. 19, 2, 13, 6*; and *Casaregis, Straccha, Huricke*, and *Targa*, may all be considered, says Kent, as maintaining the principle that the owner and not the insurer is holden for an injury done by rats. Story refers to writers upon the foreign maritime law, who lay it down that if the master of a vessel has used all reasonable precaution to prevent such a loss, as by having a cat on board, the loss is by a peril

of the sea or inevitable accident; and he cites *Roccus de Navibus, n. 58*; *Roccus de Ass. n. 49*; 1 *Emerig. Ass. 377, 378*; and see *Marsh on Ins. B. 1, c. 7, §§ 3, 4*; and *Abbott on Shipp. p. 371*; *Story on Bailm. § 513*; but this learned author considers that a loss occasioned by leakage in a vessel caused by rats is not, in the English law, deemed a loss by a peril of the sea. *Ibid.*

¹ *Ewart v. Street*, 2 *Bailey*, 161.

² *Backhouse v. Sneed*, 1 *Murph. 173*.

³ *Rohl v. Parr*, 1 *Esq. 445*.

hot climates, and a total loss was demanded upon the policy. But the decision was against the demand, upon the ground, that the loss was like the wearing and natural decay of the vessel, and not by the perils of the sea.¹ A loss of a ship by worms in an ocean, where worms ordinarily assail and enter into the bottoms of vessels, is not a peril of the sea within a policy of insurance.² Where a ship sustained an injury at the Cape de Verd Islands, in the loss of her false keel, whereby she became exposed to the action of worms, which obtained entrance into her in the Pacific Ocean, and destroyed the ship, the loss does not come within the policy, it being a consequential injury. In this case, the court held that the master should have caused the ship to be repaired; and in not doing so, he was guilty of negligence, which exonerated the underwriters from the subsequent loss by worms, which was occasioned thereby.³

§ 173. In respect to seaworthiness, the want of which was the ground of the decisions in the cases cited in the two preceding sections, the general rule of law is well settled. It flows directly from the position, that the master and owners of a freighting ship are common carriers, that their first duty is to provide a vessel tight and stanch, and furnished with all tackle and apparel necessary for the intended voyage. (a) If the shipper suffers loss or damage by reason of any insufficiency of these particulars at the outset of the voyage, he will be entitled to recompense.⁴ (b) It is a term of the contract on the part of the owner of any vessel or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and substratum of the contract, that it is so; and every reason of sound policy and public convenience requires that it should be as the law presumes. In support of this doctrine is the case of *Lyon v. Mells*,⁵ in which the owner of a lighter was held liable to the full amount

¹ So it has in like manner been held in this country. *Martin v. Salem Ins. Co.* 2 Mass. 420.

² *Hazard v. New England Ins. Co.* 1 Sumn. 218; 8 Pet. 557.

³ *Ibid.*

⁴ *Abbott on Shipp.* 5th Am. ed. p. 417.

⁵ *Lyon v. Mells*, 5 East, 428.

(a) In *Kopitoff v. Wilson*, 1 Q. B. D. 377, the implied warranty of seaworthiness is affirmed to exist, whether the vessel is a common carrier or not.

(b) *The Northern Belle*, 9 Wall. 526.

of damage occasioned by the leakage of his vessel. Lord Ellenborough there said: "This we consider as a personal neglect of the owner, or, more properly, as a non-performance on his part of what he had undertaken to do, viz. to provide a fit vessel for his purpose." In *Putnam v. Wood*,¹ the court said: "It is the duty of the owner of a ship, when he charters her, or puts her up for freight, to see that she is in a suitable condition to transport her cargo in safety." It is, moreover, the duty of the owner to keep the vessel in that condition, unless prevented by perils of the sea; and if, during the voyage, the vessel meets with an accident arising from such cause, it is the duty of the owner to see that she is put in complete repair at the next convenient port; for it is of the essence of the contract of the owner, that his vessel shall be able to receive, retain, and transport her cargo. These are principles which are not only applicable to contracts of affreightment, but govern in charter-parties and in policies of insurance.² An insufficiency in the furniture of the vessel cannot easily be unknown to the master or owners; but in the body here may be latent defects unknown to both. It may be observed, however, that defects of the latter sort cannot exist, unless occasioned by age, or the particular employment of the vessel, or some accidental disaster that may have happened to it; all of which ought to be known to the owner, and ought to lead to an examination of the interior as well as the exterior parts.³ Besides, the carrier is an insurer against all but the excepted perils; and on this ground, if the goods are lost by any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the freighter. Thus, in *Coggs v. Bernard*,⁴ Lord Chief Justice Holt said: "The law charges the person (namely, common carrier, hoyman, master of a ship) thus entrusted to carry goods, against all events but acts of God and the king's enemies."⁵ Hence, if there is a stipulation in a bill

¹ *Putnam v. Wood*, 3 Mass. 481.

² *Ibid.* See also *Kimball v. Tucker*, 10 Mass. 192; *Goodrich v. Lord*, 10 Mass. 483; *Ripley v. Schaife*, 5 B. & C. 67; *Bell v. Read*, 4 Binn. 127.

³ *Abbott on Shipp.* 5th Am. ed. p. 419.

⁴ *Coggs v. Bernard*, 2 Ld. Raym. 69.

⁵ And see *Dale v. Hall*, *ub. sup.*; *Backhouse v. Sneed*, *ante*, § 171; *Clark v. Richards*, 1 Conn. 54; *Dickinson v. Haslitt*, 3 Harris & J. 345; *Emery v. Hersey*, 4 Greenl. 407; *M'Clure v. Hammond*, 1 Bay, 99; *Putnam v. Wood*, *ub. sup.*; *Harrington v. Lyles*, 2 Nott & McC. 88.

of lading, that the vessel shall be made stanch and strong, and be in every way fitted for the voyage, it is not so much a new engagement between the parties as the confirmation of the obligation imposed upon all common carriers by the common law.¹ (a) If, however, a vessel is reasonably sufficient for the voyage, and is lost by a peril of the sea, the carrier will not be chargeable by its being shown that a stouter vessel would have outlived the storm. This was decided in *Amies v. Stevens*,² in the case of a hoy, driven by a sudden gust of wind against the pier of a bridge, through which it attempted to pass, and thereby sunk, in consequence of a shock that a stronger vessel might have sustained without sinking.

§ 174. Therefore, thus far, it appears, that it is not every loss proceeding directly from natural causes, as winds, storms, &c., which is to be viewed as happening by the perils of the sea, or the river. But again, a common carrier, although he is not liable for the act of God, may become so if he voluntarily and improperly encounter the mischief. Thus, if a barge-master should rashly shoot a bridge, when the bent of the weather is tempestuous, he would be chargeable on account of his temerity and imprudence; when it would be otherwise, if, using all proper precautions, he should be driven by the force of the current, or by the wind, against a pier, and thereby the goods should be lost;³ for then it would be deemed a loss by mere casualty.⁴

§ 175. It has appeared, also, that a carrier by land is liable for a loss happening in consequence of his deviating from the com-

¹ Holt on Shipp. 79. Hollingworth v. Brodrick, 7 A. & E. 40.

² *Amies v. Stevens*, 1 Stra. 128; cited in support of the proposition in the text, in *Abbott on Shipp.* 5th Am. ed. 475.

³ *Amies v. Stevens*, 1 Stra. 128, recognized and approved in *Coit v. McMechen*, 6 Johns. 160. See also *Elliott v. Rossell*, 10 Johns. 1.

⁴ Story on Bailm. § 492.

(a) In *West v. Steamboat Berlin*, 3 Iowa, 532, where the voyage was interrupted by ice, it was contended that the carrier was liable because of delay on the voyage. The court below charged that if the shipper knew the character and capacity of the boat, and that she could run only by daylight, the contract must be considered as entered into in reference to these things. This was held to be incorrect, and the rule was laid down that it was the duty of the master to have a boat stanch and strong and fit to transport freight at the season of the year the contract was entered into; and that it was the duty of the carrier to have men enough to run the boat both night and day.

mon and established route.¹ So in like manner a carrier by water is responsible for a loss happening by a peril of the sea, when the loss would not have thus happened, if he had not improperly encountered the mischief by deviating from the regular course of the voyage. As in a case where the defendant received on board his barge certain lime to be conveyed for the plaintiff from Burly Cliff to London. The master deviated from the usual and customary voyage without any justifiable cause, and whilst the barge was so out of her course she encountered a storm, and the sea communicating with the lime caused it to ignite, whereby the barge and cargo were lost. In an action on the case for the loss of the lime, the declaration alleged that "it was the duty of the defendant to have carried and conveyed the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same;" and averred the loss to be by reason of the deviation and departure and delay out of such usual and customary course and passage. It was held, first, that the damage sustained by the plaintiff was sufficiently proximate to the wrongful act of the defendant to form the subject of an action; secondly, that the declaration was sufficient to support a judgment for the plaintiff.² (a)

§ 176. Again, where it appeared that the regular course of vessels from New York to Norwich in Connecticut was through Long Island Sound, both in summer and in winter; that in the year 1836, the navigation of the Sound was obstructed by the ice, and for a longer period than was usual; that in the month of February, during that period, a vessel bound from New York to Norwich departed from such usual route, and performed her voyage in the open sea, on the south side of Long Island; it was held, that this was a deviation without reasonable necessity; that it, therefore, rendered the owners of the ship liable, as common carriers, for a loss occasioned by the perils of the sea. It was urged by the counsel that the danger, both to the vessel and cargo, from fire, thieves, &c., while lying in the port of New York, created such a necessity of sailing as justified the master in taking the outside passage. But this pretended danger, the

¹ *Anle*, § 164.

² *Davis v. Garrett*, 6 Bing. 716.

(a) *Phillips v. Brigham*, 26 Ga. 617.

court considered, was not peculiar to New York, and could not be esteemed imminent or uncommon; and therefore could not justify any unusual or hazardous experiment. The distinction was a very obvious one, the court observed, between this case and one in which a vessel already on her voyage and *in transitu*, departs from the usual route, by reason of obstructions of the nature of the one in question, or of blockades, &c. In such cases, the master must act; a necessity is thrown upon him; and if he is governed by a sound discretion, he stands justified.¹

§ 177. In *Hand v. Baynes*, in Pennsylvania,² the defendant, who was the owner of a line of vessels engaged in transporting goods from Philadelphia to Baltimore, received certain goods belonging to the plaintiff, on board of one of his vessels, and gave a receipt in the following words: "Received on board of Hand's line for Baltimore via Chesapeake and Delaware Canal, from J. B. (the plaintiff), one hundred slaughter hides, on deck, which I promise to deliver to J. D. at Baltimore, the dangers of the navigation, fire, leakage, and breakage excepted." The vessel left Philadelphia, and on arriving at the mouth of the canal, the captain was informed that the locks were out of order, and that he could not be allowed to pass through the canal. He then proceeded down the bay and out to sea, with the intention of going round to Baltimore; but, in a gale of wind, the vessel struck on a shoal, and with the cargo was totally lost. It was held, that the contract was a contract to carry the goods to Baltimore through the canal; and that the circumstances did not excuse the deviation from that route; that, by an alteration of the voyage, the shipper was exposed to risks which he would not have voluntarily encountered; that a voyage by sea required vessels of a different description, differently found, and differently manned; and although the shipper might have been willing to encounter the peril, in a vessel adapted to the trade, it did not follow that he would risk his property in a vessel whose ordinary route was through the canal. When the master discovered the impediments to the prosecution of the voyage, through the route called for in the contract, his duty, the court held, was plain; he had one of

¹ *Crosby v. Fitch*, 12 Conn. 410. 7 Cranch, 487; *Williams v. Grant*, 1 And see *Oliver v. Maryland Ins. Co.* Conn. 487; 3 Kent, Com. 165.

² *Hand v. Baynes*, 4 Whart. 204.

two courses to pursue: to remain in a place of safety at the mouth of the canal, or in some convenient and safe place in the neighborhood, until the obstructions were removed; or he should have returned and informed the owners and shippers of the impracticability of proceeding through the canal. The legal effect of the contract, the court held, was an engagement to carry and deliver the goods at Baltimore in a reasonable time, and what would be a reasonable time must be determined under all the circumstances, with a view to the condition of the canal, the season of the year, the state of the weather, and such other matters as might enter into the question. But, said the court, where the contract is express to deliver goods in a prescribed time, no temporary obstruction, or the impossibility of complying with the engagement, arising from the condition of the locks on the canal, or any other cause, would be a defence to a suit for a failure to perform the contract. The court were further of opinion that the clause in the receipt, "the dangers of the navigation," did not apply to dangers caused by the canal's being, by inevitable accident, rendered impassable; and that occasional interruptions of trade, arising from breaches in canals or other accidents, are inconveniences, but in no sense could they be considered as dangers of the navigation, coming within the exception; and they said, that as the contract excepted the dangers by the navigation on the route of the canal, when there may be such a danger as is provided for, it would be time enough to decide when it should arise.

§ 178. So a loss occurring by a deviation, by taking an inland passage, will render the carrier liable. The steamboat of the defendants, going through an inland passage to Charleston, South Carolina, grounded from the reflux of the tide, in consequence of which she fell over, and the bilge-water rose into the cabin, and injured a box of books belonging to the plaintiff; and it was held that the defendants were liable for the loss thus occasioned.¹ (a)

¹ Charleston Steamboat Co. v. Bason, 1 Harper, 262.

(a) So, if a contract is made to carry goods by steam and they are taken by sail, the carrier is liable as an insurer. *Wilcox v. Parmelee*, 3 Sandf. 610. *Traser v. Telegraph Construction Co.* L. R. 7 Q. B. 566. Or if the contract is to take them by sail and they are taken by steam. *Merrick v. Webster*, Mich. 268. If goods are destroyed by fire after being placed on a wharf

§ 179. However, although when, by a bill of lading, the goods are to be carried from one port to another, a direct voyage is *primâ facie* intended, yet this is a presumption which may be controlled by a usage to stop at intermediate ports, or by a personal knowledge, on the part of the shipper, that such a course is to be pursued.¹ In an action against the defendant, as the owner of a sloop, for a loss sustained by the plaintiff, in consequence of a deviation by the master, the defence was, that the sloop was a general coasting vessel from New York to Norfolk, and other places on the Chesapeake, and rivers running into that bay; that it was the usage of such vessels to take freight for several ports, stopping at the first port, and passing on to the others successively, leaving the goods taken for each, and taking in other goods; and this usage was general and public. The court held, that the bill of lading was to be construed, like other contracts, according to the intention of the parties; that usage of trade is always presumed to be within the knowledge of the parties, and that such contracts as this are supposed to be made in reference to it. There was competent evidence of the usage in relation to vessels like the one in question, and there was also evidence that the plaintiff's agent knew of it; and, therefore, the *primâ facie* intention of a direct voyage was subject to the contract which was controlled by the usage so known and established.²

§ 180. That the injury done to a carrier ship or goods on board, by her settling, on the ebbing of the tide, on a hard substance at the bottom of the harbor where she is properly moored, is an injury occasioned by the perils of the sea, is beyond all doubt; provided the injury does not proceed from an inherent weakness in the ship, or mere wear and tear. This principle is affirmed by Tindal, C. J., in *Kingsford v. Marshall*.³ The case of *Potter v. The Suffolk Insurance Company*⁴ was narrowed down to the consideration whether the loss of a vessel in that condition was from inherent weakness; and Mr. Justice Story held, that if it was not

¹ *Crosby v. Fitch*, *ub. sup.*

⁴ *Potter v. Suffolk Ins. Co.* 2 Sumn.

² *Lowry v. Russell*, 8 Pick. 360. 197.

³ *Kingsford v. Marshall*, 8 Bing.

458.

where the carrier had no right to place them, the carrier is responsible, although the goods were shipped under a bill of lading which excepted fire. *Steamboat Sultana v. Chapman*, 5 Wis. 454.

from such weakness, it was occasioned by an unusual and extraordinary accident in grounding upon the ebbing of the tide, which would, he held, be a peril of the sea. If a carrier ship, in taking ground, should fall over and thereby bilge (which would be no ordinary damage, but an unusual accident), it would be a loss by the perils of the sea, just as much as it would be if done by striking on a hard substance.¹ The case of *Fletcher v. Inglis*² did not turn upon any distinction, whether the injury was by a hard or soft bottom; but upon the point, whether it was an ordinary injury or an extraordinary accident. Cases of this sort, therefore, depend entirely upon the particular facts and circumstances attending them. Thus, in one case in South Carolina, the vessel became stranded, and the cotton which was on board was in consequence damaged, but the vessel being proved to be good and sufficiently manned, the carrier who undertook was not held liable.³ When, in another case, in the same State, where a vessel was as safely moored in a dock as she could be at the particular season of the year, settled on the bottom which declined towards the stream, and sprung a leak, and the goods were damaged by the water in the hold being thrown forward, the case was held not to come within the exception of the act of God, or inevitable accident.⁴

§ 181. A quantity of flour, on its way from Baltimore to Philadelphia, was put on board a schooner in Christiana Creek, and it was alleged, in an action against the carriers, who were common carriers between those two cities, that, at the time the vessel commenced her voyage, the tide in the creek was unusually low, owing to the prevalence of the westerly and northwesterly winds; that after she had gone a short distance she grounded, but was got off

¹ *Ibid.*; *Bishop v. Pentland*, 7 B. & C. 219.

² *Fletcher v. Inglis*, 2 B. & Ald. 315.

³ *Barnwell v. Hussey*, 3 Const. R. 114.

⁴ *Ewart v. Street*, 2 Bailey, 157. Harper, J., who delivered the opinion of the court in this case, observed: "We might well conclude, from the evidence before us, that there was no degree of neglect in the master of the vessel; that the ship was moored, so

far as could be foreseen, in the most judicious manner; and that she was staunch and seaworthy; but we cannot be assured that the jury (who had found for the plaintiffs) have found this. They may have concluded, contrary to the opinion of the witnesses, that there was mismanagement, and determined, from the fact of the ship's springing a leak, under the circumstances, that she was not seaworthy."

in safety, and then proceeded some distance farther down the creek, when she again grounded, whereby some of the planks in her bottom were strained, so that she leaked and filled with water, in consequence of which a part of the flour was transshipped by another vessel; that she again, after some time, was got afloat, and proceeded to Philadelphia, where she delivered the flour which remained on board of her to the consignee, in a damaged condition. The defendants insisted they were not liable, because the low tide was the act of God, and that act occasioned the damage. The opinion of the court was, that if the prevalence of the westerly and northwesterly winds had occasioned an uncommonly low tide in the creek, and thus, in an extraordinary manner, increased the perils of that navigation, the carriers were not bound, at their own risk, to encounter those new and extraordinary dangers; and that they would have been excusable in making a reasonable delay, until those additional and temporary perils had passed away. But inasmuch as they did proceed, they prosecuted the voyage at their own risk; they knew, or they took upon themselves to know, the changes in the navigation which had been thus occasioned, and they voluntarily proceeded; consequently they moved forward at their own risk. The jury were therefore directed that the evidence offered did not legally excuse the defendants from answering for the damage which the flour received on board the schooner, and they found for the plaintiff.¹

§ 182. If a carrier vessel should perish, in consequence of striking against a rock in the sea, or a snag in a river, or any natural obstruction, the circumstances under which the event has taken place must be ascertained, in order to decide whether it happened by a peril of the sea, or by the intervention of man. If the situation of the rock or snag, or other obstruction, is generally known, and the vessel is not forced upon it by adverse winds or tempests, the loss is to be imputed to the fault of the master;² (a) but, on

¹ Boyle v. M'Laughlin, 4 Harris & J. 291.

² Story on Bailm. § 516; Elliott v. Rossell, cited *post*, §. 185.

(a) It has been held that this doctrine does not apply to dangerous places on the Western rivers which must be passed over, and that "the course usually pursued by skilful pilots in passing a bar or snag or dangerous place in the river must be the test by which the propriety of the conduct of a carrier

on the other hand, if it is not generally known, and the master has a pilot where it is usual to have one, the loss is deemed attributable to the act of God.¹ The boatmen who transport goods from the interior of South Carolina are common carriers; and a loss, it has been held, in that State, occasioned by one of the boats running on an unknown snag, in the usual channel of the river, is referable to the act of God, and excuses, therefore, the carrier.² (a) If a shoal unexpectedly changes its bed, and a ship grounds upon it, the unknown shoal is the immediate and sole cause of the stranding.³

§ 183. In an action against the defendants, as common carriers, it was admitted that they undertook to transport the merchandise in question from Providence to New York, on board a vessel of about twenty tons, owned by the defendants, for hire, the danger of the seas only excepted. While the vessel was on her passage, she ran against a rock in Providence River, in fair weather, and under a moderate breeze, and bilged, so that the merchandise (salt) was lost. The plaintiffs contended, and brought witnesses to prove, that the rock was well known to the people in the neighborhood, and to those concerned in the navigation of that river; that the vessel, when she ran against it, was out of the usual course of navigation; that the master was not acquainted with the navigation of the river; and that it was usual to have a pilot, but that none was taken on board. The defendants, on their part, produced evidence to prove that the rock was not generally known. The defendants were held liable, because the master was ignorant of the navigation, and had no pilot on board, as was customary, and the vessel went out of the usual course. Mr. Justice Gould said: "Now such a deviation would certainly have been misconduct; the alleged ignorance of the master (there being no pilot on board) would have been a species of deficiency, in the nature of

¹ Ibid.; Case of *The William*, 6 Faulkner v. Wright, 1 Rice, 107. 1 Rob. Adm. 316, cited in Story, *sup.* And see *post*, § 187.

² *Smyrl v. Nolon*, 2 Bailey, 421. ³ Per Richardson, J., in *Reaves v. Waterman*, 2 Speer, 197.

to be ascertained." *Collier v. Valentine*, 11 Misso. 299, 310. See also *Leady v. Steamboat Highland Mary*, 17 Misso. 461.

(a) *Pennewell v. Cullen*, 5 Harring. Del. 238. See, however, *Steele v. McTyler*, 31 Ala. 667; *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120.

the want of seaworthiness ; and the want of a pilot, where one is by common usage employed, and the master ignorant of the navigation, is manifestly a culpable neglect.”¹ (a)

§ 184. By the foregoing cases, one thing is rendered perfectly clear, viz. that the question, whether the loss of, or injury done to goods, while being transported by the carrier, by natural causes, has followed the misconduct, negligence, or incompetence of the carrier, his servants or agents, or has been consequent upon the unseaworthiness or insufficiency of the vessel, is a question of fact, depending upon the finding of the jury upon the evidence.² Cases, therefore, may arise, in relation to carriers by water, as in relation to carriers by land, when a jury may be called upon to exercise very nice judgment and discrimination in weighing opposite testimony of witnesses ; as the cases we next proceed to notice afford striking examples.

§ 185. In a case where a scow was employed by the defendants as common carriers, to carry the ashes of the plaintiffs from Ogdensburgh, in the State of New York, to Montreal, in Canada, the scow was lost by splitting upon a rock, on the shoals, within sight of Montreal. The master of the scow deposed, that he took a pilot at Chateauguey, who he was informed was a good pilot ; that they passed safely over the La Chine Rapids, and that the scow was proceeding, with a strong current, in a channel which the witness knew, from long experience, to be the right channel ; that when so proceeding, a sudden gust of wind arose, and drove the scow out of the right course, the pilot calling out that they were getting out of the right channel, and urging all hands to row as hard as possible, to regain the right channel ; that the witness and all hands accordingly rowed to the utmost exertion of their strength, but in vain, as the scow was driven on the rock above mentioned, and was lost ; that the scow, manned by six able-bodied boatmen, was about a mile from the rock when the pilot

¹ Williams v. Grant, 1 Conn. 487. For sailing down rivers, or out of harbors, a pilot must be taken on board, where, by usage or the laws of the country, a pilot is required. Abbott on Shipp. p. 344. A vessel is not seaworthy if she proceeds with-

out a pilot in navigating a river, where it is the custom to take on board a licensed pilot. Abbott on Shipp. (Story's ed. 1836) 344, n. 1.

² As to the question of negligence, &c. being for the jury, see *ante*, §§ 7, 11, 16, 27, 51.

(a) This case is followed in *Fergusson v. Brent*, 12 Md. 9.

ordered the men to row, and that they continued to row for half an hour before the scow struck; that if the scow had been left to the winds and current, it would have been driven on the rocks and shoals above the place where she struck; that the scow was lightened of three boatloads before passing the Chateauguey River, so as to satisfy the pilot. These facts were also deposed to by two of the boatmen. A witness for the plaintiffs testified, that he was standing on the dock, at Montreal, about a mile from the scow at the time she struck; that he saw her about half an hour before; that the weather was fair, the sky clear, and that there was no breeze where he was; that he saw the master about half an hour after he got ashore, who said he supposed they were safe until the pilot called out, and that the pilot attempted to go to the right of the rock, and, finding he could not, endeavored to go to the left, and did not discover the rock soon enough to avoid it. Another witness said, he saw the scow strike the rock, but did not perceive any gust of wind, though there might have been a flaw of wind without his seeing it. The judge charged the jury, that the only ground on which the defendants could be exonerated would be, that the loss was occasioned by the act of God; that the cause of the loss was a fact for the jury to determine, and he left the fact for their decision, with an opinion that the loss was not owing to the act of God, within the true meaning of the rule on the subject. The jury found a verdict for the plaintiff for the value of the ashes. Upon a motion to set aside the verdict, and for a new trial, the motion was denied. Kent, C. J., said, that the only real point in the case was the question of fact submitted to the jury, viz. whether the loss of the scow was to be attributed to that inevitable necessity, not arising from the intervention of man, which human prudence could not have avoided, and which is considered in law the act of God. There was contradictory testimony upon this point, but he thought, with the judge who tried the cause, that the weight of evidence was in favor of the conclusion drawn by the jury, and that the loss did not arise from any sudden gust of wind, but from the want of due care and skill in steering the boat down a well-known and dangerous rapid; the dangers of such a rapid were at the risk of the common carrier, as much as the dangers of a broken and precipitous road. And the loss, said the learned judge, must have arisen from some extraordinary occurrence, as winds, storms, lightnings,

&c., to bring the case within the exception ; and the rest of the court concurred.¹

§ 186. Again, in an action against the owner of a sloop, to recover from him, as a common carrier, the value of goods shipped and lost, the defence was, that the sloop was stanch and well found, and that, in attempting to make Edisto Inlet, as was proper, the master, in heaving the lead, accidentally fell overboard and was drowned ; the seamen were unable to navigate the vessel, and so, by the act of God, she got upon the breakers, and was deserted by the crew. In behalf of the defendant, it was proved that the master was steady and skilful, and never known to be drunk ; that the sloop was in all respects seaworthy, and the crew sufficient. On the other hand, the plaintiff's witness (the master of a fishing-smack who saw the sloop) said, in effect, that he was in sight of the sloop several hours, and from her management thought the people on board drunk or fools, and that there was no difficulty in wind or weather. Another witness (mate of the fishing-smack) saw the master of the sloop about daylight the morning she sailed, when he seemed intoxicated ; that when they passed the sloop, he thought and said her captain must be crazy, he had so many courses, and run so far from the buoy and marks. It was held, that the testimony did not show a loss by the act of God.²

§ 187. A vessel disabled by stranding may fall within the excepted perils, but still the master may be liable for negligence in not forwarding the goods on board, or such as remain on board, after the accident, to their destination. In the event mentioned, the conduct of the master or owner, therefore, becomes a subject of important consideration, and that, with the circumstances peculiar to the case, is a matter of fact to be submitted to the jury. When all reasonable efforts, in the opinion of the jury, fail to save the cargo, the ultimate loss may be fairly regarded as resulting from the first cause, as the *vis major* ; upon the ground, that when human exertions have failed to obviate its consequences, the "act of God" may still be regarded as continuing its operation.³ By the remarks of Kent, C. J., in *Schieffelin v. New York Insurance Company*,⁴ it clearly appears, that when a vessel is detained with-

¹ *Elliott v. Rossell*, 10 Johns. 1.

⁴ *Schieffelin v. New York Ins. Co.*

² *Ross v. English*, 2 Speer, 393.

9 Johns. 21.

³ *Faulkner v. Wright*, 1 Rice, 107.

ut the fault of the master, the master ought to procure other means to send on the cargo ; and this doctrine of course applies to all cases of disability and detention of vessels occasioned by the act of God.¹ In South Carolina, it has been held, that a boat lost by running on an unknown and concealed snag in the regular channel of the river, may fall within the excepted perils;² but it is also held, in that State, that whether the duties of the master and owners cease or not, by that catastrophe, depends on the determination of the jury. In an action of *assumpsit* in the Court of Appeals of South Carolina, against the defendants, owners of a teamboat, for the value of certain goods shipped by the plaintiffs, and alleged to have been lost on board the said steamboat, plying on the Pedee River, the defence set up was, that the boat sunk by running on a concealed and unknown snag in the ordinary boat channel, when the river was fairly navigable for steamboats ; and that the loss which followed was not in consequence of any want of prudence and diligence on the part of the master and owners. There was much testimony offered on both sides ; by the defendants to sustain, and by the plaintiffs to repel, the grounds of excuse set up ; and in some respects the evidence was conflicting and contradictory. The plaintiffs insisted, especially, that the defendants had been guilty of negligence, after the steamer struck and went down, in not rescuing the goods and forwarding them to their destination. Upon this part of the case the presiding judge charged the jury, "that the duties of the master and owners did not cease with the catastrophe which arrested and detained the boat, whereby the cargo became damaged ; but that they might be held liable for damages arising from want of diligence and proper exertions towards saving and delivering the goods on board, and that the jury might regard as a proper standard of such diligence such a line of conduct as a prudent man of intelligence would have observed in taking care of his own property similarly situated." The jury found for the defendants, and a motion for a new trial was refused. But Richardson, J., dissented, and considered that under the circumstances the case should be sent back to be reconsidered by the

¹ See, on this subject, opinion of Woodworth, J., in *Treadwell v. Union s. Co.* 6 Cow. 270; *Bryant v. Commonwealth Ins. Co.* 6 Pick. 143; *Ches-*

v. Brooks, 1 Johns. 364; *Manning v. Newnham*, 2 Camp. 624.

² *Smyrl v. Niolon*, 2 Bailey, 421.

jury.¹ The general doctrine, however, clearly is, that if by reason of stranding, or some other unexpected cause, it becomes impossible to convey the cargo safely to its destination in his own vessel, the master is to do what a prudent man would think most for the benefit of all concerned.² (a) Transshipment to the place of destination, if it be practicable, is the first object, because that is the furtherance of the original object. If that be impossible, a return or safe deposit may be expedient,³ and the merchant should, if possible, be consulted.⁴ (b)

§ 188. But the unambiguous terms and the universally admitted policy of the rule of responsibility of common carriers include not only damage occasioned by the act of God as operating upon, or as secondary to, the negligence or misfeasance of the carrier or his servants, but extend to the intervention of the agency of a third person; although it has appeared, that there have been cases arising upon exceptions in bills of lading of "perils of the sea" where, in addition to losses by natural causes, those arising from the acts of third persons are allowed to come within that phrase.⁵ The general doctrine, that a common carrier insures against all accidents which may or can occur by the intervention of any human means (however irresistible they may be), has been too long established and too earnestly commended, to be now limited to his own acts.⁶ The difficulty, as has very properly been observed, in receiving the immediate agency of third

¹ *Faulkner v. Wright*, *ub. sup.*

² *Smith*, Mer. Law, 180.

³ *Liddard v. Lopes*, 10 East, 526.

⁴ *Wilson v. Millar*, 2 Stark. 1. A sale is the last thing a master should think of, because it can only be justified by that necessity which supersedes all human laws; if he sells without necessity, his owners, as well as himself, will be answerable to the merchant. *Freeman v. East India Co.*

5 B. & Ald. 617. *Wilson v. Dickson*, 2 B. & Ald. 2. Still the master's authority extends to hypothecate, or even to sell a part of it, where it is necessary to do so for repairs, in order to the preservation of the entire venture. See case of *Brig Sarah Ann*, 2 Sumn. 206; *Brown v. Lull*, 2 Sumn. 443.

⁵ See *ante*, § 166.

⁶ See *ante*, § 151 *et seq.*

(a) See *Lemont v. Lord*, 52 Maine, 265; *The Maggie Hammond*, 9 Wall. 435.

(b) In *Cox v. Foscue*, 33 Ala. 713, the vessel got aground. The plaintiff's goods were transhipped to another vessel, and were afterwards lost on her, by fire. Held, that the owners of the first vessel were not liable for the loss, although their master could have taken the goods on board again, as his vessel floated immediately after the transshipment.

persons, as the act of God or a peril of the sea, in any shape, is, that it leaves open that very door for collusion which has denied an excuse by reason of fire, theft, and robbery.¹ The true question would seem always to be, whether the loss is to be attributed to that inevitable necessity (not arising from the intervention of man), which no human prudence could have avoided.² In the case of *Forward v. Pittard*,³ which has been already referred to,⁴ where a fire broke out a hundred yards from the carrier's booth, where he had placed the goods for safe custody, and they were destroyed by the fire, the carrier was held by Lord Mansfield to be liable, though the fire was without actual negligence on his part. It may be said, that fire is an inevitable accident; but looking to the policy of the law, it is not so regarded. Being by the act of man, it may be collusive, that in the confusion depositions may be committed; and as there is a possibility of the carrier being participant in the crime, the risk is on them; or, at least, the responsibility leads to a wholesome degree of care, which might otherwise be utterly unobserved.⁵

§ 189. So it has never been doubted that the carrier is liable for the theft of a third person, whatever apparently may have

¹ Per Cowen, J., in delivering the opinion of the court in *M'Arthur v. Sears*, 21 Wend. 190.

² This rule, however apparently severe, is so established by the policy of the law, for the security of all persons, the necessity of whose affairs obliges them to trust those sorts of persons (common carriers) in the course of their dealings; for else these carriers might have an opportunity of ruining them by fraudulently combining with thieves, &c., and yet doing it in so clandestine a manner as might hardly be possible to be discovered. In support of the same rule of policy, "every thing is a negligence in the carrier or hoyman, &c., from the moment he receives the goods into his custody, which the law does not excuse; and to prevent collusive litigation, and the necessity of going into circumstances impossible to be unravelled, the law always presumes

against the carrier, unless he shows the injury to have been done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, tempests, &c. And the reason why these acts only are held not to charge carriers seems to be, that as they are not under the control of the contracting party, they ought not to affect the contract, inasmuch as he only engages against those events which by possibility and due diligence he may prevent. These rules, though said to be founded in custom, have yet always been considered to be of common law." See *Jeremy on Carr.* 56.

³ *Forward v. Pittard*, 1 T. R. 27.

⁴ See *ante*, § 156.

⁵ See 1 Bell, Com. 379. And see *ante*, § 157, as to loss of steamboats by fire.

been the care of his agent in guarding the goods stolen while in his custody.¹ Thus, if money is delivered to the master of a steamboat, who is accustomed to carry it for hire, as the agent of the owner of the vessel, and while his vessel is lying in the dock, the cabin is forcibly broken open, in the absence of him and his crew, and the money is stolen out of his trunk; the owner of the vessel, although no actual fault or fraud is imputable to the master, is answerable for the loss.² It was indeed long ago held, in an action against the master of a ship for goods delivered into his custody, and which were stolen from the ship by persons pretending themselves to be officers with a warrant to search, that the carrier was not excused.³ In an action on a bill of lading signed by the defendant, as master of a ship, it appeared that the goods were shipped at Liverpool in good order, and consigned to the plaintiff. On the arrival of the ship in New York it was found that several of the trunks had been opened, and the goods taken out; and it was admitted that the goods had been embezzled, or otherwise lost, without any fraud on the part of the defendant. The master was, nevertheless, held to answer for the value of the lost property, in accordance with the rule, in furtherance of the general policy of the marine law, which holds the master responsible, as a common carrier, for all accidents, and all causes of loss, not coming within the exception in the bill of lading.⁴

§ 190. Again, where the owner of a ship received on board at New York a quantity of goods to be carried to London, and on the arrival of the ship the goods were refused admission, being prohibited by the laws of England, and the consignee and master agreed that the goods should remain on board and be returned to the shippers in New York, at their risk, they paying the freight from London; and an indorsement was made on the bill of lading to that effect; it was held that the ship-owner was responsible for the embezzlement of any part of the goods, between the time of their first shipment at New York and their return there, although English custom-house officers were on board during the time the vessel was in London, and although they may have embezzled the goods, and not the master, or crew, or any person within their

¹ *Coggs v. Bernard*, 2 Salk. 919.
Rich v. Kneeland, Cro. Jac. 330.

² *Kemp v. Coughtry*, 11 Johns. 107,
cited more fully *ante*, § 104.

³ *Morse v. Slue*, 1 Vent. 190, 238,
cited *ante*, § 129.

⁴ *Watkinson v. Laughton*, 8 Johns.
213.

knowledge. The master's duty was to guard against such accidents, and his neglect to do it, or his misfortune in not detecting the theft, throws upon him the loss, because it was a risk he had assumed; and to admit the latter excuse by the master would be opening, in the opinion of the court, "all the evils to be apprehended from fraudulent combinations and collusions between the master and the crew, and other persons, which it was the policy of the law to prevent."¹

§ 191. Indeed, not only so, but the carrier is even answerable for the irresistible force and violence of robbers and mobs.² Though the force, says Lord Holt, in *Coggs v. Bernard*,³ "be never so great, as if an irresistible multitude of persons should rob him (the carrier), he is nevertheless chargeable." Lord Mansfield, in *Forward v. Pittard*,⁴ puts the case of the riot in London, of 1780, by which the great destruction of property in that city could not be prevented by a considerable military force, as even an instance which could not be received to protect, in that capacity, a common carrier. It was held by the same learned judge, that the master of a ship on board of which goods have been laden, in the river Thames, for a foreign port, is liable for the loss of the goods occasioned by a forcible robbery while the ship is lying in the river. "At first," said he, in giving judgment, "the rule appears to be hard, but it is settled on principles of policy, and when once established every man contracts in reference to it, and there is no hardship at all."⁵

§ 192. That the doctrine which imposes the liability of common carriers, where the loss of goods is occasioned by human agency, whether it be that of the carrier or his servants alone, or the immediate agency of third persons, applies as well to carriers by water, both inland and foreign, as to carriers by land,⁶ we may

¹ *Schieffelin v. Harvey*, 6 Johns. 170. This case is distinguishable from cases where it has been held, that during the period of detention by captors, as prize, or by the beligerent, for adjudication, all the responsibilities of the master and crew are suspended. And see *Evans v. Hutton*, 5 Scott, N. R. 670.

² See *ante*, § 149.

³ *Coggs v. Bernard*, 2 Salk. 919.

⁴ *Forward v. Pittard*, 1 T. R. 27.

⁵ *Barclay v. Cuculla y Gana*, 3 Doug. 389, cited 1 T. R. 33, nom. *Barclay v. Heygena*.

⁶ That carriers by water, both inland and foreign, are liable as common carriers, in all the strictness and extent of the common-law rule, see *ante*, §§ 80, 87, 88, and *Abbott on Shipp.* Pt. 4, c. 6, p. 389, 5th ed.

instance the case of the defective rudder, to which attention has been already called: A man hires his vessel to be repaired by a skilful workman, who makes a rudder apparently sound, but which is internally rotten, and a loss happens by reason of its breaking by the force of the sea, the owner is liable, although he was ignorant of the defect.¹ It follows, indeed, directly from the position, that the master and owner of a general freighting ship are common carriers, that if there should prove to be a latent defect in a vessel, and one undiscoverable upon examination (and it may be the fault of the builder), that the owner of the vessel must answer for the damage occasioned by the defect.²

§ 193. The doctrine is distinctly laid down by Lord Tenterden, that in considering whether a common carrier by water is chargeable with any particular loss, the question is not whether the loss happened by reason of the negligence of persons employed in the conveyance of the goods; but whether it was occasioned by any of those causes which, either according to the general rules of law, or the particular contracts of the parties, afford an excuse.³ In support of his position, the learned author has cited the case of *Gosling v. Higgins*, in which it was held that the master and owner of a ship were answerable for the loss of the goods occasioned by the seizure of the ship by the officers of the revenue for a supposed violation of the revenue laws, although in the result of the proceedings under the seizure, it may appear that there was no cause for condemnation.⁴ So, probably, says the same learned author, the master and owners would, by the common law, be answerable for a loss arising from the negligence or misconduct of a local pilot on board, to whom the direction of the ship was necessarily intrusted;⁵ though this responsibility (in

¹ *Backhouse v. Sneed*, 1 Murph. 173, cited *ante*, § 171.

² 3 Kent, Com. 205, and note (1) to Story's ed. of *Abbott on Shipp.* p. 341, and *Ib.* p. 394, note (1), 5th ed.

³ *Abbott on Shipp.* 382, 383.

⁴ *Gosling v. Higgins*, 1 Camp. 451. This was an action against the owner of a vessel for non-delivery of ten pipes of wine, shipped at Madeira, to be carried to Jamaica and thence to England. The ship was detained at

Jamaica, for a supposed violation of the revenue laws, but on appeal, the sentence of condemnation was reversed, and it was said by Lord Ellenborough: "You have an action against the officers. The shipper can only look to the owner or master of a ship." *S. C.* *Jeremy on Carr.* pp. 66, 67.

⁵ He cites the opinion of the Chief Justice in *Bowcher v. Noidstrom*, 1 Taunt. 568.

certain cases at least) is now taken away by act of Parliament.¹(a)

¹ Stat. 6 Geo. 4. c. 125, § 55. The American authorities, on the subject of pilots and pilotage, are thus given by the learned annotators to the fifth American edition of Abbott on Shipping, p. 210: "While a pilot is on board, who is regularly appointed, he has the absolute and exclusive control of the ship in the absence of the master, and is considered as master *pro hac vice*; and consequently the master is not liable for any injury happening to another vessel by the fault or negligence of the pilot during his absence, whatever might be the case, if he were present at the time of the injury. *Snell v. Eich*, 1 Johns. 305. *Yates v. Brown*, 8 Pick. 23. 3 Kent (5th ed.), 176. Whether the owner would in such a case be liable for such injury was a question left undecided by the court in the case above cited. In *Bussy v. Donaldson*, 4 Dall. 206, it was, however, decided that the owner is liable for such injury, although the pilot is public pilot of the port; and that the measure of compensation ought to be equivalent to the injury. And which would seem to be the opinion of the court in *Fletcher v. Braddick*, Bos. & P. 182, as it certainly was in *The Neptune*, 1 Dods. 467. A pilot, while he has charge of the vessel, is the agent of the owner. *Yates v. Brown*, 8 Pick. 23. The owner of a vessel, which, through the fault or negligence of any one on board, injures another vessel by running foul of her, is liable to the injured party, although there be a pilot on board, and he has the entire control and management of the vessel. *Ibid.* See *Lot Boat Washington v. Ship Saluda*, S. D. C. S. Car. April, 1831; *Williamson v. Price*, 16 Mart. La.

399; 3 Kent (5th ed.), 175, 176. The owner must seek his remedy against the pilot, who is answerable as strictly as if he were a common carrier, for his default, negligence, or unskilfulness. See *Yates v. Brown*, 8 Pick. 23, 24; 3 Kent (5th ed.), 176. Whether the owners are liable for the acts of the pilot when the master is compelled by statute to take him on board, see *Attorney-General v. Case*, 3 Price, 302; *Mackintosh v. Slade*, 6 B. & C. 657; *The Christiana*, 2 Hagg. Adm. 133; *Curtis's Merchant Seamen*, 195, 196, n. In a case where a steamboat was hired for the purpose of towing a vessel to which she was fastened, and both were under the direction of a licensed pilot, the owner of the steamboat was held not entitled to damages on account of injury sustained in the course of the navigation, and not caused by undue negligence of the pilot. *Reeves v. The Ship Constitution*, Gilpin, 579. Where the injury happened on the sea, &c., there is a familiar remedy for it in the Admiralty, in a suit for collision. *The Thames*, 5 Rob. Adm. 308. *The Neptune*, 1 Dods. 467. *The Woodrop Sims*, 2 Dods. 83. *The Dundee*, 1 Hagg. Adm. 109. *Gale v. Laurie*, 5 B. & C. 156. The neglect to take a pilot, where it ought to be done, will subject the owners to a suit for the damages that may happen to shippers and others by such default. See *M'Millan v. U. Ins. Co.* 1 Rice, 248; *Keeler v. Fireman Ins. Co.* 3 Hill, 250; 3 Kent (5th ed.), 176, n. And if captors neglect to take a pilot on board, and the captured ship be lost in consequence of the neglect, a court of admiralty will decree restitution in value against them. *The William*, 6 Rob. Adm. 316. Of course

(a) See *post*, § 664.

§ 194. If a common carrier by water, in proceeding in the unloading of his vessel, uses the tackle or machinery of a third person, as in hoisting the goods from the vessel, and the tackle or machinery breaks, and the goods are in consequence injured, the carrier is responsible.¹

§ 195. In a case somewhat remarkable in its circumstances, an action was brought against the master of a vessel navigating the rivers Ouse and Humber from Selby to Hull, by a person whose goods had been wet and spoiled. At the trial it appeared in evidence that at the entrance of the harbor at Hull there was a bank on which vessels used to lie in safety, but of which a part had been swept away by a great flood some short time before the misfortune in question, so that it had become perfectly steep, instead of shelving towards the river; that a few days after this flood a vessel sunk by getting on to this bank, and her mast, which was carried away, was suffered to float in the river, tied to some part of the vessel; and that the defendant, upon sailing into the harbor, struck against the mast, which, not giving way, forced the defendant's vessel towards the bank, where she struck, and would have remained safe had the bank been in its former situation, but on the tide ebbing her stern sunk into the water, and the goods were spoiled; upon which the defendant tendered evidence to show that there had been no actual negligence. This evidence was rejected; and it was further ruled that the act of God which could excuse the defendant must be immediate; but this was too remote; and the jury were directed to find a verdict for the plaintiff, which they accordingly did. The case was afterwards submitted to the consideration of the Court of King's Bench, who approved of the direction given by Mr. Justice Heath at the trial,

pilots themselves are responsible for any damages occasioned by their own negligence or default (3 Kent, 5th ed. p. 176), and are entitled to a proper compensation for their services. See Laws of Oleron, art. 23; Molloy, B. 2, c. 9, §§ 3, 7; Gardner v. Ship New Jersey, 1 Pet. Adm. 223, 227; The Schooner Anne, 1 Mason, 508. Pilots, like other persons, may entitle themselves to salvage by performing services beyond the mere line of their duty. Dulany v. Sloop Pelagio, Bee,

212. Hobart v. Drogan, 10 Pet. 108. Hand v. The Elvira, Gilpin, 60. The Joseph Harvey, 1 Rob. Adm. 306. The General Palmer, 2 Hagg. Adm. 176. The City of Edinburgh, 2 Hagg. Adm. 333. A suit lies in the Admiralty for compensation for pilotage performed on the high seas. The Schooner Anne, 1 Mason, 508. The pilot is a mariner. Ibid. See Hobart v. Drogan, 10 Pet. 108."

¹ De Mott v. Laraway, 14 Wend. 225.

and the plaintiff succeeded in the cause. There was no bill of lading in the case, and no instrument of contract; and therefore, the question depended upon general principles and not upon the meaning of any particular words or exception.¹ Now in this case the act of God in changing the bank was left out of the question, as not being the immediate cause, and therefore furnishing no excuse. The fastening of the mast, if not the sinking of the ship to which she was attached were the only remaining causes, and one, if not both, were obstructions placed there by human agency.²

§ 196. Where the ship of a common carrier, in a voyage from Hull to Gainsborough, drove on to an anchor in the river Trent, and was, in consequence, sunk, and the goods on board injured, and the accident was occasioned by the neglect of the third party in not having his buoy out to mark the place where his anchor lay, it was held that the carrier was bound to make good the loss.³

§ 197. In *M'Arthur v. Sears*, in New York, the doctrine that evidence of care, in case of loss proceeding from the intervention of man, and the agency of a third party, is inadmissible, is fully sustained and supported by an elaborate opinion of the court, delivered by Mr. Justice Cowen. It was an action against the owners of a steamboat as common carriers, where the boat stranded on entering the harbor in the night-time, in consequence of the master mistaking the light upon a stranded vessel for a light usually exhibited by the keeper of the beacon-light, by means whereof the plaintiffs sustained damage. It was held that nothing would

¹ *Smith v. Shepherd*, cited in *Abbott on Shipp.* p. 384, as having been first tried at the Summer Assizes for Yorkshire, 1795, and the plaintiff was nonsuited, the judge being of opinion that no case of negligence was proved. The nonsuit was set aside by the Court of King's Bench, and a new trial granted, that the facts might be more fully inquired into. The account in the text is the evidence given at the second trial. In Easter Term following, a new trial was moved for, but a rule to show cause refused.

² See opinion of Cowen, J., in *M'Arthur v. Sears*, 21 Wend. 190.

³ *Trent Nav. Co. v. Wood*, 3 Esp. 127, 4 Doug. 287, cited in *Story on Bailm.* § 518, where it seems to be considered that both parties were guilty of negligence; the one in leaving his anchor without a buoy; the other, in not avoiding it, as, when he saw the vessel in the river, he must have known that there was an anchor near at hand. Indeed, it is true, that all the judges intimated, that there was some slight degree of negligence in the defendant.

excuse the carrier except the two ordinary excepted cases, "inevitable accident," without the intervention of man, and the acts of public enemies; that neither of these exceptions existed in this case; and that proof of the utmost vigilance on the part of the master was irrelevant and inadmissible in defence of the action.¹(a)

§ 198. A buoy, it has been held, is a mere artificial and movable mark of the proper channel, and to permit it to be classed among inevitable perils or acts of God, that cause and excuse a stranding, would be opposed to the policy of the law against common carriers, and would commence the application to them of another species of bailment, viz., that of carrying for hire by private conveyance, and not as common carriers.² In this case the plaintiff shipped goods on board a vessel belonging to the defendant, which, by the bill of lading, were to be delivered in Georgetown (S. C.), "the dangers of the sea only excepted;" but which the consignee refused to receive in consequence of their damaged condition. In an action for the loss of the goods, the defence was, that the loss of the vessel was occasioned by the shifting of a buoy, which had been placed in a particular position to indicate a particular channel. The proof was, that the buoy was in its proper place when the master left the port, but sometimes drifted, and which had actually occurred to the extent of one hundred and fifty or two hundred yards, some ten or fifteen days before the vessel was stranded; that the master, in approaching the harbor, steered for the buoy, which was visible, supposing it to be where he had left it; that within a few lengths of the vessel of this object, and upon perceiving that it was wrong, he attempted to turn his vessel, but in so doing her keel struck, by which the loss was occasioned. It was held that the excuse set up by the defendant did not constitute one of those perils that come within the proper meaning of the exception, as to the

¹ *M'Arthur v. Sears*, 21 Wend. 190.

² *Reaves v. Waterman*, 2 Speer, 197, Evans, J., dissenting.

(a) In *Merritt v. Earle*, 31 Barb. 38, 29 N. Y. 115, a steamboat on the Hudson River was wrecked by running upon the mast of a sunken vessel which had been capsized and sunk by a violent storm a day or two before. The carrier was held liable for goods lost by the accident.

liability of common carriers, called the "act of God," or the unavoidable "perils of the sea."¹

§ 199. It is true that it has been held in an action on a policy of insurance, that if in moving a ship from one part of a harbor to another, it becomes necessary to send some of the crew on shore to make fast a new line, and to cast off a rope by which she is made fast, and these men are impressed immediately before casting off the rope, and thereby the ship goes on shore, it is a loss by the perils of the sea.² This decision has, however, as applicable to common carriers, been called in question. In *M'Arthur v. Sears*, it seemed to the court clear, that such an act as the sudden impressment of seamen could not be received to exempt a common carrier, either as the "act of God," or the "enemies of the state;" for, although it may be irresistible, yet so it is with many acts merely human, which may be collusively committed.³ That the carrier is an insurer to subserve the purposes of justice in any one particular case, indeed, cannot be contended, for the authorities are clear and uniform, that the law regards him as an insurer to subserve the purposes of policy and convenience; and the one is to remove all temptation to confederate with thieves and robbers; and the other to relieve the owner of the property from the necessity of proving any such confederacy.⁴

§ 200. Secondly. As to losses by the "king's enemies," or the "enemies of the state," who are sometimes called the "public enemy." By these expressions, in the sense of the law, are understood public enemies with whom the nation or state is at open

¹ In an action against the owner of a sloop to recover from him as common carrier, for goods shipped and lost, the charge of the presiding judge in the court below was, that from the contract with a common carrier, where loss is shown, the burden of proof is upon the defendant to show such act of God, or public enemy, as will excuse him; that it is not a question of fault, as the liability of a carrier may attach when he is wholly faultless; that it was for the jury to decide from the testimony, whether the loss was from a natural cause

which no human prudence could avert. On appeal, the charge was held correct. *Ross v. English*, 2 Speer, 393. In *Lawrence v. M'Gregor*, in Ohio, Wright, J., at *nisi prius*, charged, that by whatever degree of negligence another boat might run down the carrier's, this formed no excuse. *Wright*, 193.

² *Hodgson v. Malcom*, 5 Bos. & P. 336.

³ *M'Arthur v. Sears*, 21 Wend. 199.

⁴ See the opinion of Gibson, C. J., in *Hart v. Allen*, 2 Watts, 114.

war;¹(a) and likewise pirates on the high seas, who are universally treated as the enemies of all mankind, and who are doomed to be treated and punished accordingly by the laws of civilized nations.²(b.) The government itself is called upon to protect its subjects from losses by such hazard, inasmuch as private citizens have not the power to furnish the security and protection required.³ But by enemies is not to be understood thieves and robbers, who are merely private depredators, however much they may, in a moral sense, be at war with society; and so rioters and insurgents are not considered public enemies, in the sense of the law, upon this subject.⁴

§ 201. It has been said that here the question may often become material, whether we are to look to the immediate or to the remote cause of the loss; for in some instances (as under the common American bills of lading) the "perils of the seas" are

¹ Story on Bailm. § 526.

² Story on Bailm. §§ 512, 526. 1 Bell, Comm. p. 559, 5th ed. 3 Kent, Com. 216, 299. Pickering v. Barclay, 2 Roll. Abr. 248, and Style, 132, and cited in Abbott on Shipp. p. 386. Barton v. Wolliford, Comb. 56, and cited in Abbott on Shipp. p. 386. In note (m) to the page of Abbott just referred to, he cites a passage from the Digest, showing that the Roman law held a loss by pirates to be a loss by inevitable casualty: *Si quid naufragio, aut per vim piratarum perierit, non esse iniquum, exceptionem ei dari.* Dig. 4, 9, 3, 1. (*Inde Labeo scribit.*)

³ Per Hubbard, J., in Thomas v. Boston R. 10 Met. 472.

⁴ See ante, § 191; Morse v. Slue, 1 Vent. 190, 238, cited in Coggs v. Bernard, 2 Ld. Raym. 909. It has been held, under the act of Congress of 30th April, 1790, c. 36, § 8, that robbery is a substantive piracy, although the same robbery committed on land is not, by the laws of the United States, punished with death.

United States v. Palmer, 3 Wheat. 610. United States v. Jones, 3 Wash. C. C. 209. The true definition of piracy by the law of nations, is robbery upon the seas. United States v. Smith, 5 Wheat. 153. United States v. Pirates, 5 Wheat. 184. That robbers at sea are pirates, see 27 Ed. 3, c. 13, § 2; Year Book, 2 Rich. 3, cited in note to Abbott on Shipp. p. 27. To constitute piracy, within the above-mentioned act of Congress, by running away with the vessel, personal force and violence are not necessary. It is sufficient, if the running away be with an intent to convert the same to the taker's use against the will of the owner, or *animo furandi*. United States v. Tully, 1 Gallis. 247. Story's note to 5th Am. ed., Abbott on Shipp. p. 27. The African States, having acquired the character of established governments, and having regular treaties, are not at present considered as pirates. Case of The Helena, 4 Rob. Adm. 3.

(a) See Holladay v. Kennard, 12 Wall. 254; Lewis v. Ludwick, 6 Cold. 368.

(b) Gage v. Tirrell, 9 Allen, 299.

excepted, and not the acts of "the king's enemies." The case has been supposed, that a carrier ship should be driven by a storm on an enemy's coast, and she should there be captured by the enemy before she could be stranded, it seems then, it is said, that it is a loss by capture, as that is the proximate cause. It is again supposed, that the ship should be first stranded on the coast by the gale, and in consequence thereof should be afterwards captured by the inhabitants. In that case, it seems, it is said, that it would be deemed a loss, not by capture, but by the perils of the sea, upon the same principle; for the gale is the proximate cause of the stranding.¹ (a)

§ 202. It being well established, as a general rule, that no other acts but those which have above been treated of as recognized by the law, will exempt a common carrier from his common-law liability, and the loss or injury being sufficient proof of negligence or misconduct, or of the intervention of human agency, the *onus probandi* is on the carrier to exempt himself.² That the goods, in other words, have been delivered to the carrier, or his agent, and have never been delivered by him to his employer, or his

¹ Story on Bailm. § 526, who refers to the law does not excuse." Dale v. Hayn v. Corbett, 2 Bing. 205; Hall, 1 Wils. 281; ante, § 67. As Greene v. Emslie, Peake, 212; Waters v. Merchants' Ins. Co. 11 Pet. 213. to the rule in respect to private carriers for hire, see ante, § 61.

² "Every thing is negligence which

(a) See Oakley v. Steam Packet Co. 11 Exch. 618, 34 Eng. L. & Eq. 530; and cases ante, § 163, n. In Sneesby v. Lancashire R. L. R. 9 Q. B. 263, through the negligence of the defendant, a drove of cattle on the highway in charge of drovers was separated into two parts, and the cattle ran away. Most of them were soon after recovered, but six were not found for several hours afterwards, when they were discovered dead or dying on another part of the railway. It appeared that they had gone up the road a quarter of a mile, and thence through a defective fence in a garden on to the railway. Held, that the negligence of the defendant was the proximate cause of the loss. Affirmed, 1 Q. B. D. 42. See also Fordham v. Brighton R. L. R. 3 C. P. 368, affirmed L. R. 4 C. P. 619; Jackson v. Metropolitan R. L. R. 10 C. P. 49; Hobbs v. London R. L. R. 10 Q. B. 111; Bradshaw v. Lancashire R. L. R. 10 C. P. 189. In Baxendale v. London R. L. R. 10 Ex. 35, a carrier sent the goods which he had agreed to carry by another carrier, and they were lost. Being sued by the owner, he notified the second carrier, and requested him to defend the action, but this proposition was declined. The first action was defended unsuccessfully, and the first carrier sought to recover the costs of the first action. Held, that the damages were too remote. This case overrules Mors-Le-Blanch v. Wilson, L. R. 8 C. P. 227.

agent or consignee, is *prima facie* evidence of negligence or misconduct.¹ (a)

¹ Jeremy on Carr. 126. Story on Bailm. 529. 2 Greenl. Ev. § 219. Forward v. Pittard, 1 T. R. 27. Riley v. Horn, 5 Bing. 217. Hastings v. Pepper, 11 Pick. 41. Bell v. Reed, 4 Binn. 127. Clark v. Spence, 10 Watts, 335. Colt v. M'Mechen, 6 Johns. 160. Murphy v. Staton, 3 Munf. 239. "It is enough to show the damage done in order to render the common carrier liable; and the burden of proof is on him to show, that it was occasioned by such cause as will exempt him from liability." Per Harper, J., in Ewart v. Sweet, 2 Bailey, 161. See also Smyrl v. Niolon, 2 Bailey, 421; Turney v. Wilson, 7 Yerg. 340; Whitesides v. Russell, 8 Watts & S. 44; Dunseth v. Wade, 2 Scam. 288; Atwood v. Reliance Transp. Co. 9 Watts, 87.

(a) Nugent v. Smith, 1 C. P. D. 19, 34. Davidson v. Graham, 2 Ohio State, 141. Hunt v. The Cleveland, 6 McLean, 76. M'Manus v. Lancashire R. 4 H. & N. 327. The Schooner Emma Johnson, 1 Sprague, 527. Bearse v. Ropes, 1 Sprague, 331. The Ship Zone, 2 Sprague, 19. Where the carrier limits his liability by special contract, the burden of proof as to negligence is on the owner of the goods, and not on the carrier. Transportation Co. v. Downer, 11 Wall. 129, where "dangers of lake navigation" were excepted, and the vessel got aground at the entrance of a harbor. So, where "damage" is excepted. Czech v. General Steam Nav. Co. L. R. 3 C. P. 14. So, where the carrier limits his liability as to the amount to be paid for goods. Farnham v. Camden & Amboy R. 55 Penn. State, 53. So, where breakage or leakage are excepted. Peninsular Steam Nav. Co. v. Shand, 3 Moore, P. C. (N. S.) 272. Ohrloff v. Briscall, L. R. 1 P. C. 231. Thomas v. Ship Morning Glory, 13 La. Ann. 269. The May Queen, 1 Newb. Adm. 464. But see Berry v. Cooper, 28 Ga. 543; Baker v. Brinson, 9 Rich. 201; Tardos v. Ship Toulon, 14 La. Ann. 429; Roberts v. Riley, 15 La. Ann. 103; and *post*, § 267; Phillips v. Edwards, 3 H. & N. 813; Rochereau v. Bark Hausa, 14 La. Ann. 431.

In Phillips v. Clarke, 2 C. B. (N. S.) 156, 5 C. B. (N. S.) (Am. ed.) 881, there was a clause in the margin as follows: "Weight and contents unknown. Not accountable for leakage or breakage." Held, that this meant that the carrier was not liable for leakage and breakage the result of mere accident, where no blame was imputable to him, and that it was not intended to relieve him from responsibility for the result of his negligence and want of care. See Hunnewell v. Taber, 2 Sprague, 1. If the carrier limits his liability and gives no account of how the loss occurred, his negligence is presumed. American Exp. Co. v. Sands, 55 Penn. State, 140. Where loss by thieves is excepted in a bill of lading, this means by persons external to the vessel; and if goods are stolen, but it does not appear whether by some one on the vessel or by a person from the shore, the burden of proof being on the carrier, the plaintiff is entitled to recover. Taylor v. Liverpool Steam Co. L. R. 9 Q. B. 546. In Funcheon v. Harvey, 119 Mass. 469, an action for freight on a charter-party, which provided that the plaintiff was to take a cargo on board with all convenient speed and proceed direct to the port of delivery, and the declaration

§ 203. Although the general rule is, that a common carrier is responsible for loss or damage where human agency is the immediate or proximate cause, the question may arise, how far his responsibility would be affected by a loss which would and must have occurred without such proximate agency. There may have been, for instance, on the part of the carrier, misconduct, negligence, or deviation from duty, or his vessel may be unseaworthy, and a loss happen in consequence, and then is the carrier excused if it be shown that the same loss must have happened by lightning? Suppose the case of a voluntary deviation for so short a time, or under such circumstances, as that the vessel must have been overtaken by the same tempest, and the same accident must have occurred, the question would then arise, whether the owner of the vessel would be liable for the loss. Again, a vessel may be unseaworthy, and yet it may be clearly made to appear that the loss of goods on board on freight is wholly unconnected with the want of seaworthiness, as being stranded in a hurricane, or captured by an enemy, is the loss to be borne by the carrier, or is it to be deemed a loss by perils of the sea, or by the public enemy? In these supposed and other like events, by the Roman law, the carrier would not be responsible.¹ If the bailee, to use the Roman expression, says Sir William Jones, be *in mora*, that is, if a legal demand have been made by the bailor, he must answer for any casualty that hap-

¹ Story on Bailm. § 413 c.

alleged that the plaintiff performed all things in the charter contained on his part to be performed, the cargo was delivered in a damaged condition, and the issue was whether the vessel unnecessarily delayed in her port of departure, and deviated on the voyage. *Held*, that the burden of proof was on the plaintiff to show that he had complied with all the terms of the charter on his part to be performed. If the carrier is exempt from loss by leakage, this does not mean the ordinary leakage only. *Ohrloff v. Briscall*, L. R. 1 P. C. 231.

In *English v. Ocean Steam Nav. Co.* 2 Blatchf. C. C. 425, it was held that where goods in cases are shipped by sea, and on delivery are found to be injured, it will be presumed that they were properly packed in a fit state for transportation by the manufacturer or shipper, unless there is something in their appearance or condition to afford ground for a contrary inference, or unless some evidence to that effect is given, although the bill of lading contains the clause, "weight, contents, and value unknown." Where the bill of lading contained the clause, "not accountable for leakage, rust, or breakage, if properly stowed," held, that the burden was on the carrier to show proper stowage. *Edwards v. Steamer Cahawba*, 14 La. Ann. 224. See *post*, § 212.

pens after the demand; unless, in cases where it may be strongly presumed that the same accident would have befallen the thing bailed, even if it had been restored at the proper time;¹ and the doctrine is supported by Pothier.²

§ 204. It has been said that there are (and certainly there are) intimations in various common-law authorities which lead to a conclusion similar to the one above mentioned of the Roman law; and by some common-law authorities the doctrine of the Roman law is directly sustained, although the subject has been considered still open to controversy.³ In the discussion of it (it has been affirmed by very high authority), that it deserves consideration, whether there is, or ought to be, any difference between cases where the misconduct of the hirer amounts to a technical or an actual conversion of the property to his own use, and cases where there is merely some negligence or omission or violation of duty in regard to it, not conducing to, or connected with, the loss.⁴

§ 205. As to the common-law authorities in reference to the doctrine that misconduct, negligence, &c., on the part of the carrier, not conducing to, or not connected with, the loss, should not make him answerable, it has been said that if goods are improperly stowed on the deck of a ship, and they are washed away by the violence of the storm, the owner of the ship will be liable for the loss, although caused by the perils of the sea; unless the danger were such as would equally have occasioned the loss if the goods had been safely stowed under deck.⁵ (a) In a case in North Carolina, it was expressly held, that although taking a full price and stowing upon deck, will subject the owner of the vessel to pay damage, if what is so placed be thereby lost or injured, yet if that did not occasion the loss or injury, he will be no more liable for damage to that part of the cargo than for damage to the rest of it.⁶

¹ Jones on Bailm. p. 70.

⁴ Ibid. See *ante*, § 58.

² Pothier, *Prêt à Usage*, 55 to 58;

⁵ The Rebecca, Ware, 188.

Pothier on Oblig. n. 143, 627, 628;

³ Story on Bailm. § 413 d.

⁶ Gardner v. Smallwood, 2 Hayw. 349.

(a) See *The Water Witch*, 1 Black, 494. Where a common carrier, who was sued for damage done to bales of cotton, pleaded that the cotton was carried in an open boat in accordance with a custom known to the plaintiff, and that it was only damaged by rain on the voyage, held, that the carrier was not liable. *Chevallier v. Patton*, 10 Texas, 344.

If a common carrier receives goods directed to be carried in a particular manner (as, for instance, "Glass with care, this side up"), he is undoubtedly required to carry them in that manner and position; and if negligence and disregard of the directions are clearly proved, the carrier is only obliged to prove that the loss happening was occasioned by some cause not attributable to this disregard of the direction.¹ Where goods were injured on board a canal-boat by the boat's striking against a stone at the bottom of the canal, by which a hole was knocked in her bottom; in an action for the injury the court said: "The goods in question might have become wet in various ways, and thus have received the injury complained of without the boat, in which they were on the canal, being in the least deficient, but on the contrary, perfectly tight, staunch, and strong; and if so, it might be doing great injustice to infer a breach of the promise from that circumstance."² If a ship be not seaworthy and is lost, although the loss is occasioned by a peril of the sea wholly unconnected with unseaworthiness, the carrier will not be liable for the loss,

¹ *Hastings v. Pepper*, 11 Pick. 41. See *Camoy's v. Scurr*, 9 Car. & P. 183.

² *Humphreys v. Reed*, 6 Whart. 35. And see *Clark v. Spence*, 10 Whart. 336. As to the insufficiency of vessel: Per Lord Denman, C. J., in *Hollingworth v. Brodrick*: "The defence of unseaworthiness is in general applied to the time when the risk commenced; that is not done here, nor is the loss stated to have happened as a consequence of the unseaworthiness supervening. I own I feel a doubt, whether if it were distinctly averred, that the ship had by gross negligence been brought, during the voyage, to a condition in which she would not be insurable, that might not be a defence. But I think, that if it were clearly made out, the assured could not say that the loss was by perils insured against." By Patteson, J.: "The defence is put entirely upon the fact that the ship, during the voyage, was unseaworthy. It is not

stated that she became so through neglect to repair from time to time, and that that occasioned the loss. I do not know that that would have been a defence. But it is only said, that by some means the ship was greatly damaged. It is clear that the implied warranty of seaworthiness is satisfied, if the ship is seaworthy at the commencement of the risk." *Hollingworth v. Brodrick*, 7 A. & E. 40. In an action in Maryland, by the shipper of goods against the master of a vessel, who was also consignee of the cargo, in which it appeared that the vessel was bound to Barbadoes, but was obliged to put into Bermuda, where she was condemned and the cargo sold, it was held, that the plaintiff might show that the vessel was unseaworthy at the commencement of the voyage, and recover an amount retained by the defendant for freight. *Dickinson v. Haslett*, 3 Harris & J. 345.

although he would be liable if that defect was the cause of the loss.¹

§ 206. In the case of *Davis v. Garrett*,² there is a very pointed intimation, that if the loss must have happened to goods on board a vessel, without the misconduct by which it was occasioned, the owner of the vessel would not be liable for it. The facts in this case were, that the master of a barge deviated from the usual course, and during the deviation a tempest wetted the lime which was on board, and this set fire to the barge, whereby the whole was lost. The objection taken by the counsel to a recovery by the plaintiff for the amount of the loss was, that there was no natural or necessary connection between the wrong of the master in taking the barge out of its proper course and the loss itself; for that the same loss might have happened by the very same tempest, if the barge had proceeded in her direct course. Tindal, C. J., in giving the opinion of the court, answered this argument by saying: "If this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For, if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in *Parker v. James*,³ where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predict that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right or ordinary voyage. The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable." But the real answer to the objection taken by the counsel, the learned judge proceeded to say, was, "that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up, as an answer to the action,

¹ Story on Bailm. § 413 *d*, referring to *The Paragon*, Ware, 322.

² *Davis v. Garrett*, 6 Bing. 716.

³ *Parker v. James*, 4 Camp. 112.

the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction, if he could show, not only that the same loss might have happened, but that it must have happened, if the act complained of had not been done."

§ 207. In *Bell v. Reed*, in Pennsylvania,¹ Mr. Justice Brackenridge seems to have held, at the trial, that the carrier was liable for a loss by unseaworthiness, not occasioned by the unseaworthiness. But as the jury found a verdict for the carrier, that point was not material, upon the motion for a new trial. Mr. Chief Justice Tilghman, in delivering the opinion against a new trial, said: "The man who undertakes to transport by water for hire, is bound to provide a vessel sufficient, in all respects, for the voyage, well manned, and furnished with sails and all necessary furniture. If a loss happens through defects in any of these respects, the carrier must make it good." It is true the learned judge added: "The law was laid down fairly, and the fact left to the jury." But as no complaint was, or could be, made by the only party (the defendant) who had a right to complain of the ruling at the trial against him, he having a verdict in his favor, it may be doubted if the court meant at all to affirm the doctrine beyond the point by the Chief Justice.² The important case of *Hart v. Allen*, however, in the Supreme Court of Pennsylvania,³ settles the doctrine in that State. In this case it was held in an action against a common carrier for a loss, that it is not sufficient to entitle the plaintiff to recover, that there was a defect about the vessel, or want of skill in the carrier; but it must also be shown that such defect or want of skill contributed, or may have contributed, in some measure, to occasion the loss; that it is the consequence of negligence, not the abstract existence of it, for which a carrier is answerable.⁴ (a)

¹ *Bell v. Reed*, 4 Binn. 127.

² Comment by Story on Bailm. note 2, to p. 526, 4th ed.

³ *Hart v. Allen*, 2 Watts, 114.

⁴ In this case, the above-mentioned case of *Bell v. Reed* is thus commented on by Gibson, C. J., who delivered the opinion of the court: "Standing thus on the principles of the contract,

it remains to be seen how the questions stand on authority. The only thing in the books like a judicial decision of the point against the carrier is the already quoted *nisi prius* opinion by Mr. Justice Brackenridge, which is supposed to have been affirmed by this court in bank, and which, therefore, merits a particular examination.

§ 208. The subsequent case of *Reed v. Dick*, in Pennsylvania,¹ is likewise an important case on the subject. It was held, in this

It had relation to a case of stranding by storm, in which the point of defence was, that the loss had been occasioned by the act of God; to rebut which, evidence was given of want of seaworthiness by reason of certain defects in the cable and hull. The matter was put to the jury as a question of fact, and found for the carrier, and the owner of the goods appealed from an adverse determination of his motion for a new trial. The judge certainly did charge that it lies at the bottom of the contract, as a condition on which the custody of the goods is charged, that the vehicle be a good one; and that if it be not, the carrier cannot, to excuse himself from a subsequent loss, allege that it was inevitable. That he cannot urge the act of God as an excuse, when he himself had not used the human means and precautions which he had undertaken and was bound to use; and that even a stroke of lightning, or a squall in the harbor's mouth, ought not to be alleged by one who has fraudulently taken goods into an unfit vessel. That he called it fraud to do so; and that it is the faithful carrier only who can be excused on the ground of an act of Providence. That in the case of an accident from winds or waves, it is impossible to say, but the unworthiness of the vessel may have contributed to render the loss inevitable; and that unworthiness being established, the legal presumption is, that it was the cause of the accident. This is the substance of the charge; and it is evident from it, that in fixing the carrier with consequences to which his negligence may have in nowise contributed, the judge considered the law as dealing with him for a fraud. In the remarks subjoined

to his report of the trial, he avows that his opinion is not founded on the authority of adjudged cases, but on analogies drawn from the contract of insurance, though it be notorious that a breach of the warranty of seaworthiness is not visited on the assured as a penalty, but operates to avoid the policy by the failure to perform it as a precedent condition. Our present business, however, is not with the reasons of the judge, but to ascertain exactly how far his position was established by the judges in bank. In delivering the opinion of the court, the Chief Justice remarked, that there was no complaint of error of law; and that the law had been laid down fairly, the fact of seaworthiness having been left to the jury. The generality of this remark is to be qualified by the subject-matter of which it was predicated. Undoubtedly there was no room for complaint in respect of the law, nor could there be, by the owner of the goods, who, as the appellant from a verdict against him, was alone competent to complain; for the law was certainly laid down fairly, to say the least, as to him. Besides, all the remarks of the judge which were strictly relevant to the case before him, in which the species of the alleged unworthiness, especially the defectiveness of the cable, would have had an immediate and powerful effect in leading to the catastrophe, seem to have been warranted by the evidence. Now it was these remarks with which, on the motion for a new trial, the court in bank had to do; and it would have been a departure from the known habit of the Chief Justice, and perhaps even from the dictates of propriety, to have made the real or supposed errors of the

¹ *Reed v. Dick*, 8 Watts, 480.

case, that an opinion expressed by the crew of a vessel, in consultation with the master, on the soundness of a link in a chain

judge, in an abstract principle, the subject of critical remark. But that the Chief Justice admitted the solidity of the abstract principle is made more than doubtful by his own compendious statement of the principle which he deemed applicable to the case. 'The man,' said he, 'who undertakes to transport goods by water for hire is bound to provide a vessel sufficient in all respects for the voyage, well manned and furnished with sails, anchors, and all necessary furniture. If a loss happens through defect in any of these respects, the carrier must make it good.' What he would have said of a loss admitted to have happened not through defect in any of these respects, it is easy to conjecture from the guardedness of his expression; and I therefore take the adjudication of the court in bank to be an authority against the principle 'to which it has been cited; so that the judgment below, in the case before us, rests on the opinion of Mr. Justice Brackenridge alone, not only unsupported, but contradicted in an important particular by the other judges. If, as I have said, want of seaworthiness were a fraud, it would vitiate the contract entirely; yet such a notion as the avoidance of the contract for this cause, has, I believe, never been entertained. That the law would presume that the loss arose from unworthiness, admitted or established, is a more reasonable position; but would the presumption, as the judge seemed to think, be conclusive? I am at a loss to conjecture why it should. The notion seems to rest on the same foundation as the avoidance of the contract for fraud, and is evidently untenable in a case where the reverse of the presumption is admitted, or what is the same thing, is a postulate of the argument. The only other au-

thority which seems to bear at all on the point, is the case of *Amies v. Stevens*, 1 Stra. 128, cited by Justice Brackenridge, but more consonant, it seems to me, to the opinion of Chief Justice Tilghman. The hoy of a carrier with goods on board was sunk, coming through a bridge, by a sudden gust of wind. The owner of the goods, insisting that the carrier was chargeable with negligence in going through at such a time, offered evidence to show, that if the hoy had been in good order, it would not have sunk with the stroke it received; and thence inferred the carrier liable for all accidents that might have been prevented by putting the goods into another hoy. But Chief Justice Pratt held the carrier not liable, the damage having been occasioned by the act of God. For though the carrier ought not to have ventured to shoot the bridge if the bent of the weather had been tempestuous; yet this being only a sudden gust of wind, had entirely differed the case. And no carrier, he said, is obliged to have a new carriage for every journey, it being sufficient if he provides one which, without any extraordinary accident, such as this was, will probably perform the journey. From this, it seems to have been the opinion of the Chief Justice, that to render a carrier liable for an act of Providence, it is necessary that his own carelessness should have co-operated with it to precipitate the event. But the case is of greater value in ascertaining the requisite degree of ability and skill in the captain and crew; which, according to the principle just stated, is not to be measured by the exigencies of a crisis, but by its sufficiency to conduct the vessel safely to the place of destination in the absence of extraordinary accident. Nor is the carrier bound to provide a captain

cable which they were paying out to prevent the vessel from dragging her anchors, is admissible in proof of its adequacy to the ordinary exigencies of the navigation; that evidence that other vessels driven into port by the same storm were staunch and strong as any employed in the trade, is competent to show its violence; and that the sails were sufficient, is inoperative where the loss is assumed to have been occasioned exclusively by the insufficiency of the cable. In this case the opinion of the court was delivered by Gibson, C. J., as follows: "Whether we look to the carrier's common-law responsibility, or to the limit assigned to it by the exception in the bill of lading, we must hold him bound, at the peril of consequences actually produced by any defect in that particular, to provide a vessel sufficiently furnished with tackle and apparel to encounter the ordinary dangers of the voyage; not its extraordinary and unforeseen dangers, against which it behooves the merchant to secure himself by a policy of insurance. It might be supposed, therefore, that seaworthiness could not enter into the question of a carrier's liability for a loss from an act of God; or, to speak more reverently, inevitable accident, with which it might seem to have no connection. But the term is used comparatively, and as indicating a result, not exclusively of irresistible force, but of force above what is ordinarily experienced; and deficiency of equipment for ordinary exigencies may consequently be the effective cause of loss from an extraordinary peril, which would not otherwise have been disastrous. Who can set bounds to the success of human exertion by ordinary means, without which the end would be unattainable? By the energy of the crew, many a ship, whose fate would have been sealed by the breaking of a brace or the snapping of a spar, has been rescued from a lee shore. The longer a sinking ship can be kept lying afloat, the greater her chance of succor; and of the benefit of a chance, the merchant or insurer

who has already made a voyage as such, if he has acquired a competent share of skill in any other station. The first question, therefore, will be, whether the captain and crew of the boat had the degree of ability and skill thus indicated; and if it be found that they had not, then the second question will be, whether the want of

it contributed in any degree to the actual disaster; but if either of these be found for the carrier, it will be a decision of the cause. It seems, therefore, that, though the exceptions to the admission of the deposition are unfounded, the cause ought to be put, on these principles, to another jury."

is not to be deprived ; but he would be deprived of it by a defect in the pumps, or by any thing else that would hasten the catastrophe. There may, however, be disasters so sudden and so overwhelming as to bid defiance to precaution ; and in respect to these, want of preventive apparatus for accidents of another kind would not preclude the carrier from insisting on exemption from a loss occasioned by one of them as an act of Providence : as we ruled in *Hart v. Allen*, 2 Watts, 114, where the damage was induced by capsizing in a squall. Now as the proximate cause of the loss in the case at bar was the parting of a cable, its actual sufficiency for ordinary purposes without regard to the master's knowledge of its condition was the point on which the cause turned ; and the objection to the opinion of the crew in consultation with him was not for its supposed incompetence in the abstract, but for the want of an attestation of it by the oaths of those who had expressed it. I remember not what, or whether any, has been given for the admissibility of such evidence in cases of jettison ; but it seems to be admissible on general principles, as part of the *res gestæ*. Seamen are expert in nautical affairs, and their judgment in matters of opinion touching the working and preservation of a ship may be as satisfactorily attested by their acts when impelled by motives of duty and self-preservation, as if it were given under the sanction of an oath. It was remarked by Mr. Justice Story, in *Tidmarsh v. Washington Insurance Company*, 1 Mason, 439, that the standard of seaworthiness is arbitrary and dependent on the opinions of nautical men ; and certainly their opinions cannot be better manifested by their oaths than they are by their acts, which go to make up the usages of the port. Besides, when the rejected evidence was proposed, no other proof had been given of the supposed flaw in the cable than that a mark had been put upon a link in it by a hand who had left the vessel ; and surely to the judgment of that hand, thus indicated, might be opposed the declared judgment of the crew. The evidence of the condition and qualities of other vessels which were unable to keep the lake was competent to show the violence of the storm ; but inoperative, as the turning point of the cause was the sufficiency of the 'Farmer's' anchors and cables. Evidence of the condition of her sails, also, was competent in the first instance, but inoperative. As already observed, the carrier was bound to provide a vessel adequate to the navigation ; but

according to *Hart v. Allen*, the question of adequacy arises only where inadequacy could have contributed to the event. Now it appears, without contradiction, that when the chain-cable parted, the other one was slipped, and that the vessel was beached by means of her sails at the most eligible place in the harbor. It is clear, therefore, that the sails did their office to the extent of the service required of them."

§ 209. In respect to the thing bailed, it has been shown that, supposing the carrier to be accustomed to carry money for all persons indifferently, as well as goods, or that it is the usage of the trade or business to take both, the responsibility peculiar to a common carrier extends to both.¹ So it has also been shown, that the responsibility covers the baggage of passengers, in stage-coaches, railroad-cars, and steamboats;² but that letters delivered at the post-office,³ and slaves delivered to be transported from one place to another,⁴ are things and persons, the undertaking to carry which does not impose a common carrier's responsibility.

§ 210. The rule of responsibility of course does not cover losses arising from the ordinary deterioration of goods, in quantity or quality, in the course of transportation, or from their inherent infirmity and tendency to decay, or which arise from the neglect or misconduct of the owner or shipper of the goods. The carrier, for instance, is not liable for any damage from the ordinary decay of oranges, or other fruits in the course of their voyage.⁵ (a) But the master of a vessel is, nevertheless, bound to take all reasonable care of such *bona peritura*, and if they require to be aired or ventilated, he must take the usual and proper methods for this purpose.⁶ (b)

§ 211. So the carrier is not responsible for the ordinary diminution or evaporation of liquids, or the ordinary leakage of the casks, in which the liquors are put, in the course of transportation, or from their acidity or tendency to effervesce; as his

¹ *Ante*, § 100 *et seq.*

² *Ante*, § 107 *et seq.*

³ *Ante*, § 117 *et seq.*

⁴ *Ante*, § 122.

⁵ 3 Kent, Com. 299-301. Story on Bailm. § 492 *a*, 4th ed.

⁶ Abbott on Shipp. p. 371. See *Davidson v. Gwynne*, 12 East, 381.

(a) *Ship Howard v. Wissman*, 18 How. 231. *The Brig Collenberg*, 1 Black, 170.

(b) See *The Brig Collenberg*, 1 Black, 170; *The Bark Gentleman*, Olcott, Adm. 110.

implied obligation does not extend to such cases,¹ (a) unless to prevent loss from such causes is within his control. An action was brought against the owners of a steamboat on account of loss on a cargo consisting of over two hundred barrels of molasses, which the bill of lading stated to have been received in good order and well conditioned, and to be delivered at Pittsburg. The cargo was brought to Louisville, and the state of the water in the river not permitting the boat to proceed to Pittsburg, the molasses was put into a warehouse, and afterwards (with a little delay) re-shipped, and arrived, in the usual time, at Pittsburg. On delivery there, it was discovered that two of the barrels were missing, seven of them empty or nearly so, and some others only half full. Information was elicited from many witnesses as to the trade on the Western waters, and on the nature of the article of molasses, and the trade in it; for instance, that, in warm weather, from fermentation, a barrel will be full, and even running out at the bung-hole, on its being moved and carried to a dray, although when still, and in a cool place, the cask will not be full by one fourth or one third; that, on account of the fermentation and expansion of the molasses, it was necessary to have small vent holes on the top of the cask to prevent its bursting; and that through these vent holes, from three to five gallons will be lost between New Orleans and Pittsburg, if the voyage is in warm weather, as was the voyage in question. It appeared also, that the article in warm weather loses more or less by leakage, according to the goodness of the casks. It was conceded that the lost barrels must be paid for; but the question was, whether the deficiency in the others was the consequence of defect in the casks, or of bad stowage, or other causes for which carriers were answerable. The following charge to the jury in the court below was held to be correct: "No care or attention of the carrier could prevent the fermentation and expansion of the molasses in warm weather, by which a considerable quantity of molasses would be lost; this loss, therefore, arising from a law of nature, was necessary, and came

¹ 3 Kent, Com. *ub. sup.* Story on Bailm. *ub. sup.* If a pipe of wine, upon the ferment, burst in the wagon, when gently driven, the carrier is not liable; for the fault is in the wine, and the insurer does not insure against the defects of the thing itself. Farrar v. Adams, Bull. N. P. 69, cited 1 Dane, Abr. 479.

(a) Nelson v. Woodruff, 1 Black, 156.

within the exception of the act of God. The defendants ought not to be answerable for loss occasioned by the peculiar nature of the article, carried at that season of the year, nor leakage arising from secret defects of the casks, which could not have been observed or remedied after the casks were stowed away; but for all other losses, not thus occasioned, or shown by the defendant to have originated from causes beyond their control, they are answerable." And the court held that unless the defendant could prove that a fraud and imposition was practised upon him, he could not contradict the bill of lading signed by him; and that if the barrels of molasses were injured in their delivery to the carrier, and he saw and knew it, this would not be such a latent defect as would excuse him from liability for loss, beyond that which was occasioned by the peculiar nature of the article carried.¹

§ 212. With regard to the manner of putting up and packing of the goods, if it is not done in a proper manner by the owner or shipper, the carrier is not responsible for loss in consequence thereof.² For careful stowage of the goods on board the vessel,

¹ *Warden v. Greer*, 6 Watts, 424. And see *Leech v. Baldwin*, 5 Watts 446; *Gowdy v. Lyon*, 9 B. Mon. 112.

² 3 Kent, Com. *ub. sup.* Story on Bailm. *ub. sup.* Upon this subject we copy the following from Walford's Summary of the Law of Railways, London and Boston, 1850: "The ground of defence, that the injury was owing to some internal defect, or to the improper mode of packing, &c., of the articles themselves, is one that in various instances has been set up by railway companies. In *Norman v. London and Brighton Railway Co.*, which was an action for an injury to some chairs sent by the defendants' railway; the company attempted to show that the chairs were of inferior materials, and badly packed, though ultimately the plaintiff had a verdict. Home Circuit, May, 1843. Again, in *Lucas v. Birmingham and Gloucester Railway Co.*, which was an action against the company as carriers for a loss by leakage from a flask of essential oil of lemons, the defence was

that the loss arose from the improper packing of the case containing the flask, and not from any negligence on the part of the company. The plaintiff, however, obtained a verdict. Oxford Spring Assizes, 1842. So in *Rutley v. Southeastern Railway Co.* (Spring Assizes, 1845, Maidstone). This was an action for the loss of some linen goods sent by the defendants' railway, owing, as it appeared, to sparks from the engine getting inside the truck, and setting the bale containing the linen on fire. The defence was that the goods were not properly packed, the tarpaulin which covered the truck having been full of holes. The plaintiff, however, had a verdict. And where a carrier received several packages, one of watches, another of flutes, &c., and put them all up in one bag, and so sent them by railway, and the flutes were injured, it was left to the jury to say whether the accident was attributable to the carelessness of the company, or whether the plaintiff, by his own im-

the carrier is responsible. (a) The vessel must be furnished with proper dunnage (pieces of wood placed against the sides and bottom of the hold) to preserve the cargo from the effects of leakage, according to its nature and quality. And care must be taken by the master (unless by usage or agreement this business is to be performed by persons hired by the merchant),¹ (b) so to stow and arrange the different articles, of which the cargo consists, that they may not be injured by each other, or by the motion or leakage of the ship.² (c) It is evident, therefore, that the deci-

proper proceeding, contributed to the disaster; the mode of packing adopted by him having thrown upon the company a more onerous task than if they had received the articles separately. *Smith v. Birmingham Railway Co.*, Midland Circuit, 1845."

¹ *Fletcher v. Gillespie*, 3 Bing. 635.

² *Abbott on Shipp.* p. 346 "The master," says Lord Lyndhurst, C. B., "as servant of the owner, is bound to superintend the stowage, and if in consequence of improper stowage the owner has been called upon, and has satisfied any claim for damages, the master is liable to him. But where the master is told by the owner that some one will come to superintend and

do that, which would otherwise be his duty, he is exonerated. If afterwards that intention is changed, the owner should communicate it to the master." *Swainston v. Garrick*, Exchequer Trin. T. 1833, 2 Law J. (N. S.) 255. See also *The Schooner Reeside*, 2 Sumn. 567. As to leakage of a vessel caused by rats, see *ante*, §§ 169, 170. If merchandise in good order is intrusted to a carrier, and it arrives at its destination in a damaged state, when he holds it subject to freight, he is liable for the value; and if he pretends that fraud and concealment were practised upon him, the *onus* of proof lies upon him. *Hart v. Jones*, Stuart, Low. Canada, 589.

(a) The carrier is not liable if the goods are stowed in the usual manner. *Lamb v. Parkman*, 1 Sprague, 343. See also cases in n. (c). "Not accountable for leakage and breakage" does not exempt the master from due care in stowage. *Phillips v. Clark*, 5 C. B. (N. S.) (Am. ed.) 881, 2 C. B. (N. S.) (Am. ed.) 156. *Ohrloff v. Briscall*, L. R. 1 P. C. 231. See also *Hunnewell v. Taber*, 2 Sprague, 1.

(b) *Ohrloff v. Briscall*, L. R. 1 P. C. 231. *Thomas v. Ship Morning Glory*, 13 La. Ann. 269.

(c) *Sack v. Ford*, 13 C. B. (N. S.) 90. *Rochereau v. Bark Hausa*, 14 La. Ann. 431. See *Blaikie v. Stembridge*, 6 C. B. (N. S.) 894, cited *post*, § 518. If a ship is chartered, the general owners retaining the possession by their servants, the master and crew, and the charterer puts up the vessel as a general ship for freight, the owners are liable for improper stowage to a shipper who is ignorant of the charter-party, although the goods are stowed by a stevedore appointed by the charterers. *Sandeman v. Scurr*, L. R. 2 Q. B. 86. *The St. Cloud*, Brow. & L. Adm. 4. The carrier is liable to a shipper for damage done to his goods by other goods stowed in the hold of a vessel, without allegation or proof of any wilful or negligent default on the part of the

sion of a controversy, in respect to this particular subject, very much depends upon the facts which distinguish it. In an action against the proprietors of a steam-vessel to recover compensation for damage to goods sent by them as carriers, if, on the whole, it be left in doubt what the cause of the injury was, or if it may as well be attributable to "perils of the sea" as to negligence, the plaintiff cannot recover; but if the perils of the seas required that more care should be used in the stowing of the goods (articles of silk and linen) on board than was bestowed on them, that will be negligence for which the owners of the vessel will be liable. The jury, said Lord Denman, in the course of his summing up, were to see clearly that the defendants were guilty of negligence before they could find a verdict against them.¹ (a)

¹ The verdict was for the plaintiff. *Camoy v. Scurr*, 9 Car. & P. 383.

carrier. *Gillespie v. Thompson*, cited 6 Ellis & B. 477, n., 36 Eng. L. & Eq. 227. *Brousseau v. Ship Hudson*, 11 La. Ann. 427. *Cranwell v. Ship Fanny Fosdick*, 15 La. Ann. 436. *The Bark Col. Ledyard*, 1 Sprague, 530. *Bearse v. Ropes*, 1 Sprague, 331. If, however, the goods are stowed together in accordance with an established usage, the carrier is not liable, if he is not in fault. *Clark v. Barnwell*, 12 How. 272. *The Bark Col. Ledyard*, *supra*. *Baxter v. Leland*, 1 Blatchf. C. C. 526, Abbott, Adm. 348. See *contra*, *Cranwell v. Ship Fanny Fosdick*, *supra*. And the carrier is liable, although the goods are stowed in the usual way, if the injury is caused by the goods of the third party being in bad condition when put on board. *The Bark Cheshire*, 2 Sprague, 28. Shippers are liable for putting on board dangerous goods, the character of which cannot be discovered by easy inspection. *Brass v. Maitland*, 6 Ellis & B. 470; 36 Eng. L. & Eq. 221. See *Hutchinson v. Guion*, 5 C. B. (N. S.) 149; *Alston v. Herring*, 11 Exch. 822, 36 Eng. L. & Eq. 475; *Farrant v. Barnes*, 11 C. B. (N. S.) 553; *Ohrloff v. Briscall*, L. R. 1 P. C. 231; *Boston & Albany R. v. Shanly*, 107 Mass. 568. And the charterer of a ship is liable to the owner thereof for damage done to goods of other shippers which the ship-owner had to pay for, although the charterer did not know, and had no cause to suspect, that the article causing the damage would do so. *Pierce v. Winsor*, 2 Sprague, 35; 2 Clif. C. C. 18. See also *Boyd v. Moses*, 7 Wall. 316. In the Nitro-Glycerine Case, 15 Wall. 524, a carrier transported a box of nitro-glycerine, in ignorance of its contents. While in his custody at the end of the route it leaked, and in attempting to open it an explosion took place, and the property of third persons was injured. *Held*, that the carrier, being guilty of no negligence, was not liable.

(a) If goods are injured by any cause for which the carrier is not responsible, he is still bound to take all proper and reasonable care of them, to preserve them from further injury. He is not bound to repair them. *Charleston S. B. Co. v. Bason*, Harper, 262. But if the goods are wet he should, if pos-

§ 213. A common carrier, when he is expressly directed to carry goods delivered to him in a particular manner and position, is bound to carry them in that manner and position; and if he carries them otherwise, and they are lost or damaged, the burden will be upon him to prove that the loss or damage was in no degree attributable to his breach of contract, but was occasioned solely by the act of God, or the public enemy, or the act or fault of the owner himself. Thus, a box containing a glass bottle filled with the oil of cloves was delivered to a common carrier, marked "Glass — with care — this side up;" and it was held, that this was a sufficient notice of the value and nature of the contents, to charge him with the loss of the oil occasioned by his disregarding such direction. It was in evidence, and not denied, that the box was stowed in such a manner that the marked side was not kept up, and consequently the large bottle, which was broken by some means in the passage, after it was stowed and before its arrival, bore its weight upon its side, and not on its bottom.¹ But if glass, china, or any brittle or perishable commodity, requiring great care for its safe conveyance, is bailed to a carrier, enclosed in

¹ *Hastings v. Pepper*, 11 Pick. 41.

sible, unpack and dry them. *Chouteaux v. Leech*, 18 Penn. State, 224. *Blocker v. Whittenburg*, 12 La. Ann. 410. *Propeller Niagara v. Cordes*, 21 How. 7. And to do this he may open the packages in which the goods are. *Bird v. Cromwell*, 1 Misso. 81. He is not bound, however, to delay his voyage for this purpose. *Steamboat Lynx v. King*, 12 Misso. 272. See also *Soule v. Rodocanachi*, 1 Newb. Adm. 504. In *Notara v. Henderson*, L. R. 5 Q. B. 346, beans were shipped from Alexandria to Glasgow. The vessel on the voyage was injured by a collision and put into Liverpool, and the beans were found to be wet and were discharged. The vessel was repaired in a few days, and sailed with the beans on board to Glasgow. While the vessel was at Liverpool, the owner of the beans offered to receive them on payment of a *pro rata* freight. The owner of the vessel refused to deliver them unless the entire freight should be paid. The beans might have been dried at Liverpool, and much of the loss might have been saved, but if the vessel had waited she would have had to remain there some time after the repairs to her were finished. *Held*, that although the master was not obliged to delay his voyage, he was not justified under the circumstances in refusing to deliver them. This case was affirmed on appeal. L. R. 7 Q. B. 225. In *Hingston v. Wendt*, 1 Q. B. D. 367, it was *held* that a master had a lien on cargo for expenses incurred in saving it. The vessel in this case got ashore, and the expenses were incurred solely for the cargo. If hides need cleaning, the master should have it done. *Rogers v. Murray*, 3 Bosw. 357.

boxes, and no directions are given as to how the boxes are to be carried, and no notice of the peculiar nature of their contents, the carrier is only bound to take the ordinary care of the boxes which their general character and appearance seem to require. In such case, the owner of the boxes is culpable for concealing the peculiar nature of their contents.¹

§ 214. A common carrier is liable for the safety of animals of the brute creation delivered to him for transportation, (a) though

¹ See *In re Webb*, 6 Scott, N. R. 956. In the Superior Court of New York, April 26, 1848, Judge Oakley presiding, there was an action (*Carisse v. Johnston*) to recover damages for injuries done to a case of looking-glasses shipped on board the defendant's vessel. In his charge to the jury, the learned judge said: "I do not consider that common carriers are in all cases responsible for not delivering property in a sound state. They are not warrantors that the property shall remain safe and sound. They are only warrantors for its safe delivery, and their further responsibility depends upon whether they use due care and diligence in carrying the property, or that negligence can be proved against them by any omission on their part to do what prudent men should do under such circumstances. In the present case, no act, or omission of an act, has been proved to show that the defendants were negligent, or that they did any thing to injure the property. If they are responsible, it arises from an inference of law, that if property is given to common carriers, for transportation, and when given to them is in a sound state; and that it is in an unsound state when delivered, it is the duty of the common carriers to show how it was injured. For if the property

was in a sound state when delivered to the carrier, and found to be injured when delivered to the owner, it would be imposing on him a great hardship to be obliged to show some act of negligence on the part of the carrier. For in order to do so, he must go on board the vessel to come at the facts of the case, and possibly could not succeed in eliciting them. If in this case the jury were satisfied that, when the goods were delivered at the wharf, or put on board the vessel, they were then in a sound state, and that on their arrival at Baltimore they were found to be broken, then the defendants are responsible, unless they show how it occurred. In this case, there was nothing to show that the injury might have occurred from perils of the sea, and it is difficult to account for how it could have happened, unless there was some negligence on the part of the defendants. The law presumes, that if the goods were safe when put on board, that the injury to them arose from negligence on the part of the defendants, unless they show the contrary. And if the injury arose from negligence on the part of the captain or owners, then they are responsible for it, otherwise they are not." *Journ. of Comm.* April 27, 1848.

(a) In *Nugent v. Smith*, 1 C. P. D. 19, where a mare was so injured, while being transported by a common carrier by sea, that she died, the jury found that the accident was caused partly by more than ordinary weather, and partly by the conduct of the mare herself, by reason of fright and consequent strug-

it has been seen he is not liable, as such, for the transportation of the persons of slaves. Where a dog had been delivered to a carrier, and the animal escaped by means of slipping from the noose about his neck, the carrier was held liable, because he had the means of seeing that the animal was insufficiently secured; and Lord Ellenborough said, that the delivery of the dog was not like the case of goods imperfectly packed, since there the defect is not visible; but the defendant had the means of seeing that the dog was insufficiently secured, and he was bound to lock up the animal, or take other proper means to secure the animal.¹(a) If a horse escapes from his fastenings on board of a steamboat and is lost in the river, the owners of the boat are responsible; for the horse must have been negligently fastened, or the loss would not have occurred; and *primâ facie*, this negligence is attributable to the owners of the boat or their servants.² So where an animal is sent over a railroad, the company are liable for any injury it may sustain either by the improper construction of the carriage, or the want of reasonable equipments, or the improper position of the carriage in the train.³(b) The rule with regard to proper equip-

¹ *Stuart v. Crawley*, 2 Stark. 323.

² *Porterfield v. Humphreys*, 8 Humph. 497.

³ So ruled by Lord Chief Justice Denman in *Walker v. London Railway*

Co., Kingston Spring Assizes, 1843, cited in Walf. Sum. of Law of Railways, 305. Palmer v. Grand Junction Railroad Co. 4 M. & W. 749.

pling, without any negligence of the defendant's servants. The defendant was held liable. Brett, J., delivering the judgment of the court, said: "We think also that the fright of the mare was a natural and probable result of the rough sea, — a fright likely to happen in the case of any ordinary horse, — and cannot be considered such a vice in the inherent nature of this particular mare as to absolve the defendant." The judgment in this case was, however, reversed on appeal. 1 C. P. D. 423. If an animal is injured while in a carrier's possession, the owner may maintain an action for the injury, although he gave no notice to the carrier of the injury, nor offered the animal to the carrier to be cared for. *Evans v. Dunbar*, 117 Mass. 546.

(a) But see *Richardson v. Northeastern R. L. R.* 7 C. P. 75.

(b) In *Pratt v. Ogdensburg R.* 102 Mass. 557, it was held that the fact that a person delivering horses to a railroad for transportation accepted a defective car, knowing it to be defective, did not exempt the railroad from liability for a loss occasioned by the defect, without proof of a contract on his part to assume the risk of such defect. See also *Railroad Co. v. Pratt*, 22 Wall. 123. In *Hawkins v. Great Western R.* 17 Mich. 57, the owner of animals assumed "all risks of loss, injury, damage, and other contingencies in loading, unload-

ments to insure the safety of an animal holds also as to ferry-boats. A special verdict was found in a case, that the defendant was the owner of a public ferry; that the chain with which the flat was fastened to the bank was unusually large and apparently strong; that in attempting to drive the wagon of the plaintiff, heavily laden, into the flat, the chain broke, in consequence of which the horse of the plaintiff was so much injured as to be of no value; that several wagons, equally heavy laden, had before passed there; that the chain had been for some time used thereat; that the blacksmith, who mended it, was of opinion that it was equal to any chain he was capable of making; that there was no negligence on the part of the defendant's ferryman. The court below pronounced judgment in favor of the defendant; but on a motion to reverse the judgment in favor of the plaintiff, it was entered for the plaintiff, the court, in giving their opinion, saying: "It must be known to every ferryman, that the strain upon a chain, when the fore wheels of a loaded wagon first strike against a flat to enter it, is very great, and that, therefore, he ought to be provided with a chain of great strength to support such a blow, but particularly when the descent from the bank to the flat is steep and considerable." The court further said, that "in cases of this kind it would be difficult to draw a line between what was due diligence or what was not; but it is not difficult to prove that though an unlooked-for accident of this sort might happen, without the ferryman's being provided against it, he ought, however, to be accountable for the injury sustained."¹(a)

§ 214*a*. If the animal is injured or destroyed by the peculiar risks to which it is exposed, the carrier is clearly excusable. Thus, if horses or other animals are transported by water, and in consequence of a storm they break down the partitions between them, and by kicking each other some of them are killed, the carrier will be excused; and it will be deemed a loss by perils of the sea.² And, in case of an animal sent by railway, it has been

¹ *Rutherford v. M'Gowen*, 1 Nott & McC. 17. See *ante*, § 78. *Lawrence v. Aberdeen*, 5 B. & Ald. 107. And see *ante*, § 24.

² *Gabay v. Lloyd*, 3 B. & C. 793.

ing, conveyance, and otherwise." *Held*, that this did not include an injury caused by the bottom of the car, in which the animals were, dropping out, and that the carrier was liable.

(a) *Wilsons v. Hamilton*, 4 Ohio State, 722.

ruled that the company are not liable for an accident arising from the animal's own viciousness or want of temper.¹ (a) Such a case would seem to be analogous to the case of the loss of merchandise owing to some inherent defect which caused the destruction of it while in transit.²

§ 215. Sometimes goods are put on board a vessel to be stowed

¹ Walker v. London Railway Co.,
ub. sup.; and see also *post*, note to
§ 277.

² See *ante*, § 210 *et seq.*

(a) Blower v. Great Western R. L. R. 7 C. P. 655. Kendall v. London R. L. R. 7 Ex. 373. In Clarke v. Rochester R. 4 Kern. 570, it was held that a carrier of animals is responsible for any injury which can be prevented by foresight and care, although arising from the conduct of the animals, but that he is not an insurer against injuries arising from the nature and propensities of the animals, and which diligent care cannot prevent. It was also held that the fact that the owner of a horse was allowed passage on the train in which his horse was carried did not prove conclusively, if at all, that he was to attend to the horse's safety during the journey. See also Smith v. New Haven R. 12 Allen, 531; Evans v. Fitchburg R. 111 Mass. 142; Hall v. Renfro, 3 Met. Ky. 51; Conger v. Hudson River R. 6 Duer, 375; Harris v. Northern Indiana R. 20 N. Y. 232; Ohio R. v. Dunbar, 20 Ill. 623. In Powell v. Pennsylvania R. 32 Penn. State, 414, it was held that if a railroad company permits straw or other combustible materials to be used as bedding for live stock in their cars, and the live stock are injured by the straw catching fire, the company is liable, although the straw was put in with the consent of the owner of the stock. Where an entire car is chartered to a person for his cattle, and he has charge of the loading of the car, the company is not liable for a damage sustained by improper loading. If the car is defective the company is liable on the contract of hire, but not as a carrier. East Tennessee R. v. Whittle, 27 Ga. 535. See Welsh v. Pittsburg R. 10 Ohio State, 65. In Gill v. Manchester R. L. R. 8 Q. B. 186, the plaintiff signed a contract, by which the railroad, to which a cow was delivered for carriage, was not to be liable for loss or injury in the delivery occasioned by kicking, plunging, or restiveness. On arrival at the place of destination, a porter began to unfasten the car in which the cow was, when he was warned not to do it, as she would run at him. He disregarded the warning, and let the cow out. She ran about the yard and got upon the line, and was run over by a passing train. Held, that the contract did not dispense with reasonable care on the part of the defendant, and that there was evidence of negligence on its part. In Illinois Central R. v. Adams, 42 Ill. 474, hogs were transported by a railroad under a contract which provided that they were "to be fed and taken care of by owner." A loss occurred by the neglect of the conductor of the train to cause water to be poured over the hogs when overheated, which it was shown was usually done in such a case, by placing the car under the spout of watering tanks. Held, that the conductor was negligent in not doing so, and that the road was liable.

on deck, and they thus become liable to be thrown overboard in cases of extreme danger to the vessel and crew, and in such event the loss falls on the owner of the goods, unless so far as the owner of the goods may be entitled to contribution, as in case of a general average.¹ Yet, if the goods are, without necessity, thrown overboard, the carrier will be chargeable with the loss.² (a) If a ferryman should, in the emergency of a storm, throw overboard a box of jewels, and it was done from absolute necessity to save life, he would not be responsible; but if done rashly, it would be otherwise.³

§ 216. In an action against the defendants, as owners of a certain schooner, for not delivering flour shipped at Georgetown for Portsmouth, it appeared that twenty barrels of it were shipped to go under deck at a certain price per barrel, and one hundred and forty barrels were shipped to go on deck, at half that price for freight. It appeared, that, on coming on Nantucket shoals in bad weather and with a heavy sea, the vessel struck, and was in such danger as to render it necessary, for the preservation of the lives of the crew, and for the safety of the vessel and cargo, to throw some part of the latter overboard; and accordingly the

¹ Story on Bailm. § 530 *a*, 4th ed.; *Smith v. Wright*, 1 Caines, 43; *Lenox v. United Ins. Co.* 3 Johns. Cas. 178. See *post*, § 328.

² *Ibid*.

³ *Mouse's case*, 12 Rep. 63. *Bancroft's case*, cited in *Kenrick v. Eggleston*, Aleyn, 93. And see *Jones on Bailm.* 107, 108; *Bird v. Astcock*, 2 Bulst. 280; 2 Roll. Abr. 567. "The case of *Bancroft*, as cited by Lord Chief Justice Rolle, would seem to imply a responsibility of the carrier even in cases of jettison. It is stated thus: A box of jewels had been delivered to a ferryman, who knew not what it contained, and a sudden storm arising in the passage, he threw the box into the sea. Yet it was resolved that he should answer for it. Sir William Jones suspects that there must have been some proof of culpa-

ble negligence in the case, and that probably the casket was both small and light enough to have been kept longer on board than other goods. Even then the case would be sufficiently hard; as the ferryman did not know the contents, and might have acted for the best. But if the doctrine of the case be, that jettison will not, in a clear case of necessity, discharge the carrier, it is not law; for it was expressly decided, in Lord Coke's time, in the case of a bargeman (cited by Lord Coke in *Bird v. Astcock*, 2 Bulst. 280), that where goods were thrown overboard in a great storm to save the lives of the passengers, by lightening the barge, the bargeman was exonerated; for the storm was the act of God, and the occasion of throwing them overboard." Story on Bailm. § 531.

(a) So if the jettison is rendered necessary by the fault of the carrier. *The Portsmouth*, 9 Wall. 682.

whole of the deck load and twenty barrels from the hold, being the plaintiff's flour, were thrown over. The value of the twenty barrels under deck was afterwards settled for in the general average, leaving only the deck load in controversy. The defendants insisted that they were absolved from liability for the goods shipped on deck, both by the general principles of the law merchant and by the usage and custom of America. The defendants were held not liable to contribution, as it was in evidence that the jettison, by which the plaintiff's loss was occasioned, was justified by the highest necessity; and as it was not pretended that the property could have been preserved by any exertion on the part of the master or mariners.¹

§ 217. The law on the subject of jettison is thus laid down by Tindal, C. J., in the case of *Gould v. Oliver*:² "When the loading on the deck has taken place with the consent of the merchant, it is obvious that no remedy against the ship-owner or master for a wrongful loading of the goods on deck can exist. The foreign authorities are indeed express on that point;³ and the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasioned his loss, leads to the same conclusion."⁴

§ 218. If the goods are, without the consent of the merchant, or contrary to established usage, stowed on deck, and are, from their being so placed, thrown overboard in tempestuous weather, the carrier will be answerable for the loss by the jettison.⁵ Where the master of a vessel received hogsheads of gin on board, to be transported at customary freight, which were stowed on deck, and which were ejected during the voyage by reason of tempestuous weather; it was held, that the owners were liable for the loss, unless such stowage was authorized by consent of the merchant, or by custom. It was not pretended that the jettison was without justifiable cause, but the complaint was careless stow-

¹ *Dodge v. Bartol*, 5 Greenl. 286.

² *Gould v. Oliver*, 4 Bing. 142.

³ Valin, tit. dec Capitaine, art. 12. Consol. del Mar, c. 183.

⁴ It has been held in the Supreme Court of New Brunswick, that a master of a ship who has signed the usual bill of lading is not liable for a loss by the jettison of goods which have

been laden on deck with the knowledge and consent of the shipper and consignee. *Johnston v. Crane*, 1 Kerr, 353.

⁵ 3 Kent, Com. 206. *The Rebecca*, Ware, 188. *Smith v. Wright*, *ub. sup.* *Lenox v. United Ins. Co.* 3 Johns. Cas. 178. *Waring v. Morse*, 7 Ala. 343.

age, in putting the gin on deck, when it ought to have been put in the hold.¹ (a)

§ 219. In respect to the doctrine of general average, which arises in cases of jettison, and other accidents in cases of transportation of goods by sea, the law allows a compensation to the owners of the goods, where the goods are thrown overboard for the common benefit, and they may demand a *pro rata* contribution from all other persons deriving a benefit from the sacrifice.² This subject, however, more appropriately belongs to a treatise on the law of shipping.³ Carriers on land, it may be added, are entitled to the same equity, and may be entitled, if not to a common contribution, in the nature of a general average, at least, to compensation for expenses incurred by them about the preservation of the goods from extraordinary perils, which do not properly belong to them as carriers.⁴

¹ Barber v. Brace, 3 Conn. 9.

³ See Abbott on Shipp. P. 3, c. 8.

² Smith, Mer. Law, 260. Story on Bailm. § 583. Gillett v. Ellis, 11 Ill. 579.

Stevens on Average.

⁴ Story on Bailm. §§ 389, 584. And ante, §§ 42, 43.

(a) Lawrence v. Minturn, 17 How. 100. The burden is on the ship-owner to prove that the shipper agreed that his property might be carried on deck. The Peytona, 2 Curt. C. C. 21. Where a bill of lading expressly stipulates that certain goods named therein may be carried on deck, parol evidence is inadmissible to show that the shipper agreed that another portion should be so carried. Sayward v. Stevens, 3 Gray, 97. And in The Delaware, 14 Wall. 579, it is held that where the bill of lading is silent as to the place of stowage, the law implies that the goods are to be carried under deck, and parol evidence of an agreement that the goods were to be carried on deck is inadmissible. In Texas it has been held that if cotton is shipped in an open boat the shipper knowing that it is not to be covered, the carrier is not liable for damage to it by rain. Chevaillier v. Patton, 10 Texas, 344.

CHAPTER VII.

OF THE RESPONSIBILITY OF COMMON CARRIERS AS RESTRICTED, LIMITED, AND QUALIFIED BY SPECIAL CONTRACT AND BY STATUTE.

§ 220. IN addition to the two instances of exemption from the responsibility of common carriers (losses by the act of God and the public enemy), which are accorded by the common law, there is the instance of exemption by their own act, viz., that of a special acceptance. The principles of the common law are to be understood with the limitation that there is no special contract between the parties, which varies the general obligation of carriers, for if there clearly appear such a contract, it governs the case.¹ (a) The right of admitting qualified acceptances of common carriers seems to have been asserted in early times. Thus, a special acceptance is recommended by Lord Coke in a note to Southcote's case,² in which he says that if goods be delivered to one to be delivered over, it is good policy to provide for himself in special manner, for doubt of being charged by his general acceptance. Sir Matthew Hale, in giving judgment in *Morse v. Slue*,³ says that, "if the master would, he might have made a caution for himself, which he omitting, and taking in goods gen-

¹ See *ante*, § 59.

² Southcote's case, 4 Co. 84. And see *Kenrig v. Eggleston*, Aleyn, 93; *Austin v. Manchester R.* 104 C. B. 454; 11 Eng. L.

³ *Morse v. Slue*, 1 Vent. 238 (24 & Eq. 506).

(a) See *Scaife v. Farrant*, L. R. 10 Ex. 358. A common carrier may make an agreement that he shall not be held liable for a loss, unless claim is made therefor within ninety days from the delivery to him of the article to be carried, where the time occupied in the transit is not long. *Express Co. v. Caldwell*, 21 Wall. 264. See also *Lewis v. Great Western R.* 5 H. & N. 867. A stipulation in a receipt that the carrier should not be liable for a loss, unless a claim was made within thirty days after the date of the receipt, was held to be unreasonable and void, when goods were shipped from Indiana to Georgia in time of war, when transportation was much interrupted. *Adams Exp. Co. v. Reagan*, 29 Ind. 21.

erally, he shall answer for what happens." Although in these cases the point was not expressly adjudged, that a common carrier may restrict his liability by express contract, yet such was assumed to be good law; and it was only so assumed by Mr. Justice Yates, in *Gibbon v. Paynton*,¹ and by Lord Ellenborough, in *Leeson v. Holt*.² In *Nicholson v. Willan*,³ the last-named learned judge found no direct adjudication, that a common carrier may limit his common-law responsibility by a special contract; but he relied on the fact that such an exemption had never been, by express decision, denied. But there was a direct adjudication, in the year 1800, in an action of assumpsit, at *nisi prius*, before Lord Kenyon, against the defendant, as a common carrier, for not safely carrying a chest of tea from London to Leeds. The carrier demanded a certain sum for booking, and refused to take charge of the tea unless such sum was paid; and it was held that he was not liable to an action if the tea was left without being paid for and was lost. Lord Kenyon said: "When no rate is fixed by law, the carrier is entitled to say on what terms he will carry; he is not obliged to take every thing which is brought to his warehouse, unless the terms on which he chooses to undertake the risk are complied with by the person who employs him. The old

¹ *Gibbon v. Paynton*, 4 Burr. 2301.

² *Leeson v. Holt*, 1 Stark. 186. Meaning of the exception as to robbers, &c. The defendants received from the plaintiffs, at Panama, certain goods to be delivered in London, "the act of God, the queen's enemies, pirates, robbers, fire, &c., excepted." The goods were carried to Southampton, and were there placed in a rail-

way truck, from whence they were secretly stolen in the course of their transit to London. Held, that this was not within the exception a loss by "robbers," since the word "robbers" meant, not thieves, but robbers by violence. *De Rothschild v. Royal Mail Steam Packet Co.* 7 Exch. 734; 14 Eng. L. & Eq. 327. (a)

³ *Nicholson v. Willan*, 5 East, 513.

(a) In *Taylor v. Liverpool Steam Co.* L. R. 9 Q. B. 546, five boxes of diamonds were shipped under a bill of lading excepting "pirates, robbers, thieves," and "leakage, breakage, pilferage." It also contained the following clause: "The ship-owner is not to be liable for any damage to any goods which is capable of being covered by insurance." One of the boxes of diamonds was stolen while on the ship, but there was no evidence to show whether by a passenger or by one of the crew, or after the vessel's arrival by some one from the shore. Held, that the word "thieves" meant persons external to the ship. Held, also, that the word "damage" would include damage to the goods amounting to a total loss, but did not apply to the case of an abstraction of the goods; and that the plaintiff was entitled to recover.

mode of declaring used to be on the custom of the realm; but this is in assumpsit, it is founded in contract, and the contract must, therefore, govern the parties."¹ The doctrine is considered to be now fully recognized and settled, beyond any reasonable doubt, in England.²

§ 221. The subject was fully considered in *Gould v. Hill*, in New York,³ and the conclusion arrived at by Cowen, J., who gave the opinion of the court, was, that a common carrier could not restrict his obligation, even by a special contract.⁴ But Bronson, J., in giving the opinion of the court in *Hollister v. Nowlen*, was not disposed to deny that a common carrier may, by express contract, limit his responsibility. Attention was given to the subject in the late case of the New Jersey Steam Navigation Company, in the Supreme Court of the United States,⁵ and the court expressed themselves unable to perceive any well-founded objection to a restriction, by a special contract, or any stronger reasons for forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties.⁶ (a)

¹ *Anonymous v. Jackson*, Peake's Add. Cas. 185.

² Story on Bailm. § 549. *Clay v. Willan*, 1 H. Bl. 298. *Harris v. Packwood*, 3 Taunt. 264. *Smith v. Horne*, 8 Taunt. 146. *Riley v. Horne*, 5 Bing. 217. *Ranger v. Great Western R.* 1 Eng. Rail. & Canal Cases, 1. And see English cases cited in *Hollister v. Nowlen*, 19 Wend. 234; and in *Cole v. Goodwin*, 19 Wend. 251.

³ *Gould v. Hill*, 2 Hill, 623.

⁴ See the case more fully stated,

post, § 239. And see the opinion of Cowen, J., in *Cole v. Goodwin*, 19 Wend. 251.

⁵ *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344. See also the opinion of Huston, J., in *Bingham v. Rogers*, 6 Watts & S. 499.

⁶ In New York the question was considered by Bronson, J., as "perhaps debatable." *Wells v. Steam Navigation Co.* 2 Comst. 209. See *post*, § 239.

(a) *Davidson v. Graham*, 2 Ohio State, 131. *Mercantile Ins. Co. v. Chase*, 1 E. D. Smith, 115. *Michigan Central R. v. Hale*, 6 Mich. 243. *Boswell v. Hudson River R.* 5 Bosw. 699. Parol evidence of such a contract is admissible. *American Transp. Co. v. Moore*, 5 Mich. 368. *Roberts v. Riley*, 15 La. Ann. 103. And so is usage, *Cooper v. Berry*, 21 Ga. 526. If a common carrier undertakes to transport an article in his line of business, the legal presumption is, that he does it subject to his common-law liability. And this presumption remains until it is overcome by positive proof of a special agreement. *New Jersey R. v. Pennsylvania R.* 3 Dutch. 100. It is not enough for the carrier to show that it was his custom to except a particular peril in the bill of lading, where the goods are lost by such peril after delivery

§ 222. In respect to carriers by water and by sea, whenever the master and owners of a ship engage with separate merchants to convey the goods to the place of her destination, the contract is said to be for a conveyance in a general ship;¹ and it is usual to advertise such ships in the newspapers, or in cards and hand-bills; and care should be taken in doing this to insert nothing in the advertisements which it is not the ship-owner's intention to make strictly good; since it may not be clear that some of the terms of such advertisement may not be construed as incorporated into the contract.² (a)

§ 223. But the instrument to which reference is generally had for the terms of such a contract is the bill of lading, the substance of which is a formal acknowledgment of a receipt of goods,

¹ See *ante*, § 89.

² Abbott on Shipp. P. 2, c. 2.

to the carrier and before the bill of lading is signed, although knowledge of such custom is brought home to the shipper. *Illinois R. v. Smyser*, 38 Ill. 354. If a person signs a special contract in ignorance of its terms, through the assurance of an agent of the carrier that it is a mere matter of form, he is not bound by the terms of the contract. *Simons v. Great Western R.* 2 C. B. (N. S.) 620. But mere ignorance of the contents on the part of the person signing the contract is not enough; and if the person appointed by the owner to take charge of the property and see to its transportation signs a special contract in the owner's name, his principal is bound. *Squire v. New York Central R.* 98 Mass. 239. Where goods were shipped under a bill of lading which excepted loss by fire and dangers of the river, a clause in the bill of lading to the effect that the owners of the barge agreed to "insure the freight shipped on the barge against leaking and sinking," was construed to be an insurance of the seaworthiness of the barge. *Hill v. Sturgeon*, 28 Misso. 323. Generally an insurance company by paying for a loss on goods is subrogated to the rights of the owner against the carrier; but the carrier may contract with the owner of goods that, in case of loss, he shall be subrogated to the rights of the owner against the insurer; and in such case the insurer's claim against the carrier does not exist. *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 173.

(a) In *Phillips v. Edwards*, 3 H. & N. 813, the carrier had sent a notice to various merchants, and among others to the plaintiff, stating the terms and conditions on which he would carry goods. This notice was received by the plaintiff. Afterwards he shipped goods by the carrier and received, three days after the shipment, a freight note containing a description of the goods, and a charge for freight to the place of destination. This was made out on a printed form such as was usually sent to persons on the arrival of their goods. It contained terms and conditions less favorable to the carrier than the notice. Held, that the notice, and not the freight note, was the contract.

and an engagement to deliver them to the consignee or his assigns; ¹ (a) in the nature of a way-bill, when goods are carried by land. Several copies of such written contract are commonly made out, of which the merchant sends one or two to the person for whom the goods are destined, and retains one for himself.² The modern English form of the bill of lading contains these words: "The act of God, and the king's enemies, fire, and all and every other dangers of the seas, rivers, and navigations of whatever nature and kind soever, excepted." The two first of these, we have seen, are exceptions even at common law; and the third was made so, in England, by Stat. 26 Geo. III. c. 86, § 2, which enacts, "that no owner or owners of any ship or vessel shall be subject or liable to answer for, or make good to, any

¹ Per Rogers, J., *Cope v. Cordova*, 6 Harris & J. 394. *Steamboat Owen* 1 Rawle, 203. *Ferguson v. Cappeau*, v. Johnson, 2 Ohio State, 142.

² Smith, Mer. Law, 176.

(a) An account for freight, usually called a freight bill, is not a bill of lading. *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120. See *Dows v. Rush*, 28 Barb. 157; *Dows v. Greene*, 24 N. Y. 638; *The Schooner Emma Johnson*, 1 Sprague, 527. Stipulations in bills of lading should be made in terms sufficiently intelligible to indicate an agreement that the law merchant is not to prevail. In *Brittain v. Barnaby*, 21 How. 527, a stamp in red ink was put on the back of the bill of lading by the ship-owner, which provided that freight was to be paid before delivery, if required. The court, assuming that the stamp was on before the bill of lading was delivered to the shipper, considered that there was no evidence of any assent to its provisions by the shipper, and held that it was not admissible to control the provisions of the bill of lading. See also *Western Transp. Co. v. Newhall*, 24 Ill. 466; *Lewis v. Great Western R.* 5 H. & N. 867; and cases *post*, § 231; *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594. If the bill of lading delivered to the shipper differs from that retained by the ship, the former governs. *The Thames*, 14 Wall. 98. The bill of lading is said to be but evidence of the contract, and it may be shown that the goods were carried under a different contract made by the shipper and a person authorized by the owners of a vessel. *Trask v. Jones*, 5 Bosw. 62. The bill of lading usually acknowledges the receipt of the goods in good order. This is merely *prima facie* evidence that outwardly the goods are in good order. *Nelson v. Woodruff*, 1 Black, 156. *Clark v. Barnwell*, 12 How. 272. *Hastings v. Pepper*, 11 Pick. 41. But more force seems to have been given to this expression in *Tarbox v. Eastern Steamboat Co.* 50 Maine, 339. If a ship receives goods and carries them to the port of destination and libels them for freight, the owners of the vessel are estopped to deny the liability of the vessel to deliver the goods in like good order as received, with the usual exceptions, because the master refused to sign bills of lading. *The Water Witch*, 1 Black, 494.

one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever which shall be shipped, taken in, or put on board, any such ship or vessel, by reason or means of any fire happening to or on board of said ship or vessel." Lord Tenterden remarks, that the master is not mentioned therein, and that it may therefore be doubtful whether his responsibility is in this case removed by the statute, but that the insertion of the word "fire" in the bill of lading certainly removes it.¹ (a)

¹ Abbott on Shipp. P. 3, c. 4. "The same statute enacts (§ 3) that no master, owner, or owners of any ship or vessel shall be liable to answer for, or make good any loss or damage which may happen to any gold, silver, diamonds, watches, jewels, or precious stones, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing, to the master, owner, or owners of such ship or vessel, the nature, quality, and value of such gold, silver, diamonds, watches, jewels, or precious stones. By stat. 6 Geo. 4. (Pilotage Act) c. 125, § 53, owners and masters of ships are exempted from liability for any damage arising from the want of a licensed or duly qualified pilot, unless it be proved that such want arose from any refusal to take one on board, or from wilful neglect, in not heaving to, or using all practicable means consistent with the ship's safety, for the purpose of taking on board any pilot who may offer; and § 55 exempts them from liability for damage arising from the neglect, default, incompetency, or incapacity of any licensed pilot in charge of the vessel, so long as such pilot shall be duly qualified to have charge of

the vessel, or no duly qualified pilot shall have offered to take charge thereof. It will be seen that the common-law liability of ship-owners is discharged to a considerable extent by these enactments; where it remains, it is restricted to a certain ascertainable amount by stat. 7 Geo. 2 c. 15, which exempts the owners from responsibility for loss by reason of any embezzlement, secreting, or making away with, by the master or mariners; or for any act, matter or thing, damage, or forfeiture, done, occasioned, and incurred by the same persons, without the privity of the owners, further than the value of the ship, with her appurtenances, and the freight due, or to grow due for the voyage wherein such loss happened (§ 1. See *Sutton v. Mitchell*, 1 T. R. 18). Stat. 26 Geo. 3, c. 86, § 1, extends the provisions of this act to all cases of robbery, though the master or mariners be not concerned therein. By stat. 53 Geo. 3, c. 159, owners are not liable to answer for, or make good any loss or damage arising by reason of any act, neglect, matter, or thing done, committed, and occasioned without the fault and privity of such owner or owners, which may happen to any goods, wares, merchandises, or other things laden or put on board the ship, further than the value of the ship and freight due, or to grow due, during the voyage which may be

(a) For the American statutes, see *ante*, § 90, n.

§ 223 *a*. The authority of the master of a ship is large, and extends to all acts that are usual and necessary for the use and management of the vessel. Among other powers he may sign a bill of lading, and acknowledge the nature, quality, and condition of the goods. Constant usage shows this; and if a more limited authority is given, the party not informed of it is not affected by such limitation.¹ But the master of a ship has no general authority to sign a bill of lading for goods which are not put on board the vessel; and consequently the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master, without receiving the goods on board.²(*a*)

in prosecution, or contracted for at the time of the happening of the loss. This statute further defines what shall be considered freight, within its meaning (§ 2), and that of the two prior acts; and orders that distinct losses, happening during the same voyage, or same interval between two voyages, shall be compensated in the same way, and to the same extent, as if no other loss had happened during the same voyage or interval; and, as well as the two former ones, provides a proportionable compensation in cases where the value of the ship and freight is less than the total amount of losses, and a mode of distribution and relief in equity. But this act does not extend to vessels used solely in rivers

and inland navigations, nor to any ship not duly registered according to law; nor do any of the acts extend to lighters and gabbets (*Hunter v. M'Gown*, 1 Bligh, 573). The benefit of the last three mentioned acts does not extend to masters; and the last contains a provision against relieving the master, who happens to be a part-owner, from responsibility; yet if he be sued along with the part-owners, he will be protected as well as they; for it is a rule that the damages given against co-defendants must be one and the same sum. (*Wilson v. Dickson*, 2 B. & A. 2.")

¹ Smith, Mer. Law, 559.

² *Grant v. Norway*, 10 C. B. 665; 2 Eng. L. & Eq. 337.

(*a*) *Brown v. Powell Coal Co.* L. R. 10 C. P. 562. *Schooner Freeman v. Buckingham*, 18 How. 182. *The Bark Edwin*, 1 Sprague, 477. *Hubbersty v. Ward*, 8 Exch. 330; 18 Eng. L. & Eq. 551. *Coleman v. Riches*, 16 C. B. 104; 29 Eng. L. & Eq. 323. This principle does not, however, apply where the goods have been delivered to the agents of the vessel, and are in their custody. Thus in *Bulkley v. Naumkeag Steam Cotton Co.* 24 How. 386, *nom.* *The Bark Edwin*, 1 Sprague, 477, it was held that where it is necessary to lighter the goods to a vessel lying in the stream, the vessel is liable *in rem* for the loss of the goods while being lightered, if they have previously been delivered to the agents of the vessel. See also *British Columbia Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 499. The converse of the proposition is also true; and the vessel is not liable although the goods are on board, if they have been put there without the knowledge of the agents. *The Keokuk*, 9 Wall. 517. In *The Lady Franklin*, 8 Wall. 325, the goods were delivered to a person who was agent of several vessels not owned by the same parties,

§ 224. In this country, although the loss of the property delivered for transportation, by an accidental fire, furnishes no sufficient excuse, yet it may be rendered otherwise by the terms of the bill of lading.¹ (a) In *Patton v. Magrath*, in South Carolina,² Richardson, J., says: "Need I remind the owners of steamboats that they have but to give public notice that they will not be liable in certain classes of cases; and, to deceive no one, give no other bill of lading but with the express written condition 'not to be liable for accidents by fire,' and they make the desired exception." In *Swindler v. Hilliard*, in the Court of Appeals of South Carolina, in 1846,³ it was held that a common carrier might limit his liability by a special contract, that is, by a bill of lading containing the exception, "dangers of fire and navigation only excepted;" and that the term "fire" meant any fire, and was not restricted to fire originating from the furnace of the boat. It may, sometimes, however, be somewhat questionable what is a loss by fire. Where the register of a sugar-house was kept shut by mistake, so that the sugar was overheated and spoiled, this was held, in a suit on a policy of insurance, not to be a loss by fire, but by mismanagement.⁴

§ 225. In the important case of the *New Jersey Steam Navigation Company v. Merchants' Bank*, in the Supreme Court of the United States,⁵ it appeared that one W. F. Harnden was engaged in the business of carrying for hire packages of goods, specie, and bundles of all kinds, for any persons who would employ him, to and from the cities of New York and Boston; and that his mode of conveying them was the established public conveyances between those cities. That in the exercise of his employment he had

¹ *Parker v. Flagg*, 26 Maine, 181.

⁴ *Austin v. Drewe*, 6 Taunt. 436;

² *Patton v. Magrath*, Dudley, S. C. 4 Camp. 380.

159.

⁵ *New Jersey Steam Nav. Co. v.*

³ *Swindler v. Hilliard*, 2 Rich. 286. *Merchants' Bank*, 6 How. 344.

and he agreed to ship it by some of these vessels. The goods were shipped on "The Water Witch," and the clerk of the agent afterwards, through mistake, gave a bill of lading in which the goods were described as shipped on "The Lady Franklin." Held, that the latter vessel was not liable. The shippers being the owners of the goods and the libellants, the bill of lading was held not to be conclusive. Where, by the custom of trade, bills of lading are signed before the goods are delivered on board, the bills are considered as conditional only. *Fearn v. Richardson*, 12 La. Ann. 752.

(a) *York Company v. Central Railroad*, 3 Wall. 107.

entered into an agreement with the above-mentioned company, by which, in consideration of a certain sum per month, he was to have the privilege of transporting in their steamers a wooden crate of given dimensions, subject to these conditions: 1. "The crate, with its contents, to be at all times exclusively at the risk of the said Harnden, and the company not, in any event, to be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, &c., to be conveyed or transported by him in said boats, or otherwise in the boats of said company. 2. That he should annex to his advertisements published in the public prints the following notice, which was also to be annexed to his receipt of goods or bills of lading. 'Take Notice: William F. Harnden is alone responsible for the loss or injury of any articles committed to his care; nor is any risk assumed, nor can any be attached to the proprietors of the steamboats in which his crate may be, and is transported, in respect to it, or its contents, at any time.' " The question being made, whether it is competent for the common carrier to restrict his obligation by such an agreement, the court declared it as their opinion, that, as the extraordinary duties annexed to his employment concern only, in the particular instance, the parties to the transaction, involving simply rights of property, the safe custody and delivery of the goods, they were unable to perceive any well-founded objection to the restriction. The extent of the restriction of the common-law liability in such cases of express contract, the court held, is, that the carrier is not to be regarded in the exercise of his public employment, but as a private person, who incurs no responsibility beyond that of a private carrier, or of an ordinary bailee for hire; or, in other words, he was answerable only for misconduct or the want of ordinary diligence.¹ (a)

§ 226. There has prevailed for a long period a practice in

¹ As has been laid down, *ante*, 539, there was no bill of lading. See Chap. III. In the case of *Hale v. the case stated*, *ante*, § 158. *New Jersey Steam Nav. Co.*, 15 Conn.

(a) *Express Co. v. Kountze*, 8 Wall. 342. *Brehme v. Adams Exp. Co.* 25 Misso. 328. *Orndorff v. Adams Exp. Co.* 3 Bush, 194. *Goldey v. Pennsylvania R.* 30 Penn. State, 242. *Welles v. New York Central R.* 26 Barb. 641. *Peninsular Steam Nav. Co. v. Shand*, 3 Moore, P. C. (N. S.) 272. See *post*, § 528, n., as to what contract a carrier may make when he carries a passenger gratuitously.

respect to carriers by water, of accompanying the shipment with a bill of lading which specifies the "perils" or the "dangers" of the sea or of the river, as excepted. The precise meaning of these words, and whether it is exactly commensurate with that of the words "act of God" (from liability from losses by which the carrier is by law always exempted), has been already considered.¹ In *Williams v. Grant*, in Connecticut,² Mr. Justice Gould held, that common carriers were not liable for losses by perils of the sea, whether the bill of lading contained any exception or not; and the same point was affirmed in the same State by the whole court in a subsequent case.³ But nevertheless, as has been shown, the words in question do extend to some events not attributable to natural causes.⁴ In any event, however, as has also been shown, they do not include losses that might have been avoided by the exercise of reasonable skill and diligence, and by proper conduct.⁵ And so likewise may it be said of the exception in bills of lading of "dangers of the lake," notwithstanding which the owners are liable for a loss by negligence;⁶ and so also are they for a loss in consequence of deviation.⁷ Where a bill of lading was signed by the master of a vessel, acknowledging the receipt of certain goods, and stating that they were to be transported from Buffalo to Cleveland, "the dangers of the lakes and rivers only excepted," it was held, that the legal effect of this agreement was to convey the goods from Buffalo to Cleveland by the most direct route.⁸

§ 226 *a*. No exception (of a private nature at least) which is not contained in the contract itself can be engrafted upon it by implication as an excuse for its non-performance.⁹ The declaration in an action on a contract of affreightment stated that the plaintiff had shipped on board the defendant's ship, then in the bay of Gibraltar, and bound for London, certain goods to be safely conveyed to London, the act of God, the queen's enemies, fire, all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, save risk of boats, excepted; the breach stated was, that the defendant failed so to

¹ *Ante*, § 166.

² *Williams v. Grant*, 1 Conn. 487. 329.

³ *Crosby v. Fitch*, 12 Conn. 410.

See also *Neal v. Sanderson*, 2 Smedes & M. 572.

⁴ *Ante*, §§ 166-169.

⁵ *Ante*, § 167.

⁶ *Fairchild v. Slocum*, 19 Wend.

329.

⁷ See *ante*, §§ 175-180.

⁸ *May v. Babcock*, 4 Ohio, 334.

⁹ Per Lord Ellenborough, in *Atkinson v. Ritchie*, 10 East, 533.

convey and deliver the goods agreeably to his undertaking; and the plea was, that the ship, in the course of her voyage, called at Cadiz (agreeably to the terms of the contract), and was then within the jurisdiction of the officers of customs there, and of a certain court (described in the plea); that while the ship was there, the goods were, according to the law of Spain, lawfully taken out of the ship by the said officers against the will and without the default of the defendant, on a charge of suspicion of their being contraband according to the law of Spain, and were confiscated by a decree of the said court. It was held, on demurrer, that the plea alleged no excuse within the express exceptions in the contract; that the decree of confiscation was in itself no answer; and that it did not appear by the plea to have been incurred by any fault in the plaintiff. The defendant's contract was in effect a contract of insurance against all but certain specified risks, and the seizure in question was not one of them.¹ (a)

§ 227. The privilege of transshipment in a bill of lading reserved to the carrier does not discharge him from any responsibility which is incident to his contract, until the goods be delivered at their destined port. A stipulation, for instance, in a bill of lading, that the shipper, in case of low water in the river, may reship in other craft, does not vary his obligation to deliver safely. Such stipulation is for the benefit of the carrier, in securing to him the advantage of as great a portion of the freight as he could earn, and to throw upon the owner any increase of expense; and the relation and responsibility of a common carrier continues from the shipment of the goods until their arrival at the destined point of delivery.² (b) Where the undertaking was

¹ *Spence v. Chodwick*, 10 Q. B. & S. 44. *M'Gregor v. Kilgore*, 6 Ohio, 143. *Dunseth v. Wade*, 2 Scam. 517.

² *Whitesides v. Russell*, 8 Watts 288.

(a) See *Howland v. Greenway*, 22 How. 491. When a common carrier makes a specific contract to carry a particular lot of goods, and there are no circumstances to indicate that he received them for any different compensation than he would as common carrier, it seems that his liability is not measured merely by the terms of the contract, but also by the law applicable to common carriers. See *Morrison v. Davis*, 20 Penn. State, 171.

(b) See also *Broadwell v. Butler*, 6 McLean, 296; *Sturgess v. Steamboat Columbus*, 23 Misso. 250; *Carr v. Steamboat Michigan*, 27 Misso. 196; *Dalzell*

to deliver a cargo, with the privilege of reshipment at a particular place on the way, and the undertaker stopped short of the point designated, and the cargo was lost in a storm, it was held that he was responsible. As the storm was a peril of the river, and an act of God, the carrier would have been excused if he had encountered it in the ordinary course of the voyage, and of his duty; but as it was encountered when out of the course of his voyage and of his duty, and might have been avoided but for a disregard of his duty and of his contract, the carrier made himself liable.¹ By the insertion, therefore, in the contract, of these words, "the privilege of reshipping," although the carrier is allowed to transship or reship in another vessel, his contract is not performed until the delivery of the goods at the place of their destination.²

§ 228. A parol agreement between the master of a vessel and a shipper of goods, before and at the time of executing a bill of lading, permitting the master to deviate from the usual route, is inadmissible evidence in an action by the shipper against the owners of the vessel to recover for the loss of the goods. But parol evidence of the custom of navigating Lake Erie is admissible, though not for the purpose of varying a written contract, but for the purpose of carrying it into execution, as understood by the parties.³

§ 229. Evidence is not admissible to vary the common form of a bill of lading, by which the goods were to be delivered in good order and condition, "the dangers of the seas only excepted," by establishing a custom, that the owners of packet vessels, between New York and Boston, should be liable only for damage to goods occasioned by their own neglect.⁴ Mr. Justice Story, in giving his opinion in this case, said he could not but deem every relaxation

¹ *Cassillay v. Young*, 4 B. Mon. 265.

² *May v. Babcock*, 4 Ohio, 334.

³ *The Schooner Reeside*, 2 Sumn.

⁴ *Little v. Semple*, 8 Misso. 99. 567.
And see *ante*, §§ 95-97.

v. Steamer Saxon, 10 La. Ann. 280; *Hatchett v. Steamer Compromise*, 12 La. Ann. 783. Where goods are shipped with the privilege of transshipment, and are damaged on the voyage and are transshipped under a bill of lading which contains a provision that the second carrier shall not be responsible for the damage done by the first, the second carrier is not liable for such damage, although the owner of the goods has not received the second bill of lading. *Wilson v. Harry*, 32 Penn. State, 270.

of the common law, in relation to the duties and responsibilities of the owners of carrier ships, to be founded in bad policy, and detrimental to the general interests of commerce. In respect to the established usage set up in the case, the learned judge said: "I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business or trade to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find that, of late years, the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or a custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties. Now, what is the object of the present asserted usage or custom? It is to show, that, notwithstanding there is a writ-

ten contract (the bill of lading) by which the owners have agreed to deliver the goods shipped in good order and condition, at Boston, the danger of the seas only excepted; yet the owners are not to be held bound to deliver them in good order and condition, although the danger of the seas has not caused or occasioned their being in bad condition, but causes wholly foreign to such a peril. In short, the object is to substitute for the express terms of the bill of lading an implied agreement on the part of the owners, that they shall not be bound to deliver the goods in good order and condition; but that they shall be liable only for damage done to the goods occasioned by their own neglect. It appears to me that this is to supersede the positive agreement of the parties, and not to construe it." (a)

§ 230. In a case in the Court of Appeals of South Carolina, in 1817, in which the action was to recover damages for the loss of a large number of bales of cotton that were consumed by fire on the defendants' steamboat, one of the legal propositions of the appellant was, that the ship-owners were exempt from liability at common law, for the accidental loss by fire, by reason of the usage of the carriers in the particular trade, exempting them from such common-law liability. The court held that a custom or usage intended, as in this case, to alter established rules of law, must be of very long standing, so as to imply the general acquiescence of all parties; whereas the custom or usage in question of exemption from losses by fire was not only of very recent origin, but had, in that State, been continually resisted.¹

¹ *Singleton v. Hilliard*, 1 Strob. Magrath, Dudley, S. C. 163, and 203, the court referring to *Patton v. Swindler's case*, 2 Rich. 286. See also

(a) So far as the bill of lading is a contract, parol evidence to vary its terms is not admissible; hence representations made before the signing of a bill of lading by the consignor of goods shipped under it, concerning the depth of water at the port of delivery, are not admissible to vary the obligation of the carrier. *Shaw v. Gardner*, 12 Gray, 488. See also *The Delaware*, 14 Wall. 579; *White v. Vankirk*, 25 Barb. 16; *Cox v. Peterson*, 30 Ala. 608; *Simmons v. Law*, 8 Bosw. 213. Parol evidence is admissible to explain a bill of lading. *Bradley v. Dunipace*, 1 H. & C. 521. *Russian Steam Nav. Co. v. Silva*, 13 C. B. (N. S.) 610. In *Harmon v. New York R.* 28 Barb. 323, a receipt was given by a railroad for a lot of furniture, and it specified "1 cradle." The cradle was bound round with a carpet, and contained a valise and clothes, and there was evidence that the contents were communicated to the railroad. *Held*, that it was liable for the loss of the valise. In *Chouteaux*

§ 231. But between the shipper and the ship-owner the bill of lading is not conclusive as to the quantity of merchandise shipped on board; as in the case of a bill of lading signed by the master for eight hundred and ninety bags of pepper, and the declaration alleged that that number were shipped, and that some of them had been lost; but the defence was, that only seven hundred and ninety bags were, in fact, shipped, and that the captain had been induced to sign the bill of lading for the greater number by the fraud of the plaintiff's agent; Chief Justice Tindal said he was of opinion that, as between the original parties, the bill of lading was merely a receipt, liable to be opened by evidence of the real facts, and left the question to the jury, whether, in fact, the greater or the lesser number of bags were shipped.¹ The bill of lading is doubtless *prima facie* evidence of the amount and condition of the property shipped, (a) but the carrier may explain the bill by showing a mistake in the quantity and condition, and that he has complied with his legal duty in delivering all the property, and in as good order as received.² (b) So the carrier may be permitted to give evidence in contradiction to his bill of lading, that the goods were delivered to him in good order, if it be clearly proved that a fraud or imposition was practised upon him.³ But this rule does not apply to third persons, and if a third person is

Turney v. Wilson, 7 Yerg. 340. It is the doctrine in Ohio, that in bills of lading, where the terms used have by usage acquired a particular signification, the parties will be presumed to have used them in that sense. But usage will not be permitted to control the terms used, unless it is established by clear and satisfactory proof. *Wayne v. Steamboat Gen. Pike*, 16 Ohio, 421.

¹ *Bates v. Todd*, 1 Moody & R.

106. And see *Berkley v. Watling*, 7 A. & E. 29. Where a bill of lading is signed and delivered before the goods are shipped, or even purchased, it will cover any goods afterwards shipped as and for those named in the bill of lading. *Rowley v. Bigelow*, 12 Pick. 307.

² *Canfield v. Northern R. Co.* 18 Barb. 586. *Dickerson v. Seelye*, 12 Barb. 99.

³ *Warden v. Greer*, 6 Watts, 424.

v. Leech, 18 Penn. State, 224, the court held circumstantial evidence admissible that a printed clause in a receipt limiting the liability of the carrier was by mistake not struck out.

(a) *Turner v. Ship Black Warrior*, 1 McAll. 181.

(b) *Bissel v. Price*, 16 Ill. 408. A clause in the bill of lading, "Any damage or deficiency in quantity, the consignee will deduct from balance of freight due the captain," does not take the case out of the general rule. *Meyer v. Peck*, 28 N. Y. 590.

induced to become an indorsee of a bill of lading, for the value of it, the ship-owner cannot, as against such indorsee, dispute what the master, by his signature, has affirmed.¹(a) The master,

¹ Howard v. Tucker, 1 B. & Ad. 712.

(a) In *Sears v. Wingate*, 3 Allen, 103, the following rules are laid down: "First. The receipt in the bill of lading is open to explanation between the master and the shipper of the goods. Secondly. The master is estopped, as against a consignee who is not a party to the contract, and as against an assignee of the bill of lading, when either has taken it for a valuable consideration upon the faith of the acknowledgments which it contains, to deny the truth of the statements to which he has given credit by his signature, so far as these statements relate to matters which are or ought to be within his knowledge. Thirdly. When the master is acting within the limits of his authority, the owners are estopped in like manner with him; but it is not within the general scope of the master's authority to sign bills of lading for any goods not actually received on board. See also *The Lady Franklin*, 8 Wall. 325; *Wolfe v. Myers*, 3 Sandf. 7; *Ward v. Whitney*, 3 Sandf. 399, 4 Seld. 442; *O'Brien v. Gilchrist*, 34 Maine, 554; *Knox v. The Ninetta*, Crabbe, 534; *Benjamin v. Sinclair*, 1 Bailey, 174; *Backus v. Schooner Marengo*, 6 McLean, C. C. 487; *Wayland v. Mosely*, 5 Ala. 430; *Sutton v. Kettell*, 1 Sprague, 309; *The Henry*, 1 Blatchf. & H. Adm. 485; *Bissel v. Price*, 16 Ill. 408; *Butler v. The Arrow*, 1 Newb. Adm. 59; *Manchester v. Milne*, Abbott, Adm. 115; *Goodrich v. Norris*, Abbott, Adm. 196; *Hall v. Mayo*, 7 Allen, 454; *Ryder v. Hall*, 7 Allen, 456; *Bradstreet v. Heran*, 2 Blatchf. C. C. 116; *Dows v. Greene*, 32 Barb. 490; *Meyer v. Peck*, 33 Barb. 532, 28 N. Y. 590. Where the expression "contents unknown" is in the bill of lading, the acknowledgment of the master as to the condition of the goods extends only to the external condition. *Clark v. Barnwell*, 12 How. 272. *Bissel v. Price*, 16 Ill. 408. *The Columbo*, 3 Blatchf. C. C. 574. *Ellis v. Willard*, 5 Seld. 529. And if the expression "weight unknown" is in the bill of lading, the master is only bound to deliver the weight shipped, although the bill of lading contains a statement of the weight. *Shepherd v. Naylor*, 5 Gray, 591. So if the expression is one thousand bushels "more or less." *Kelley v. Bowker*, 11 Gray, 428. The same rule applies where the weight is stated in writing, and the expression "weight unknown" is in print. *Jessel v. Bath*, L. R. 2 Ex. 267. See *Tully v. Terry*, L. R. 8 C. P. 679, *post*, § 398; *McLean v. Hope*, L. R. 2 H. L. Sc. 128. In *Lebeau v. General Steam Nav. Co.* L. R. 8 C. P. 88, the plaintiff delivered to the defendant for carriage a case containing silk goods. The bill of lading as tendered by the plaintiff described the contents as linen goods; but, before signing it, the master stamped it with the words "weight, value, and contents unknown." A higher rate of freight was payable for silk goods than for linen, and the plaintiff paid as for linen; but the jury found that the representation was through inadvertence, and was not fraudulent. *Held*, that the effect of the stamp was to do away with the representation, and that the plaintiff was en-

therefore, should be careful not to sign bills of lading, until the goods are actually delivered to him, nor to permit the insertion of statements at variance with the facts; as by so doing he may bind his owners, and become himself responsible to them.¹

§ 232. But there never have been many questions, and but few comparatively are likely to arise, upon the interpretation of positive or express contracts entered into for the transportation of goods. Many of the questions which have of late years, in England, engaged the attention of courts, have been upon implied contracts, or upon the validity, obligation, and effect of the written or printed notices given by common carriers in the course of their public employment, and posted up and distributed, which announced that the carrier would not be accountable for property of more than a specified value, unless the owner had insured and paid an additional premium for it. This practice in England grew out of the advancement of commerce, the increase of personal property, and the consequent frequency with which articles of great value and small bulk were transmitted from one place to

¹ Abbot on Shipp. P. 4, c. 4. A bill of lading signed by the master, for goods delivered on board his vessel for transportation, is the contract of the owner of the vessel. *Ferguson v. Chappeau*, 6 Harris & J. 394. If the admission in a bill of lading be construed to apply to the condition of the goods, the shipper may show that it was made by mistake, or procured by fraud; as he is not bound to examine the inside of a package. *Warden v. Greer*, 6 Watts, 424. *Gowdy v. Lyon*, 9 B. Mon. 112, referring to Abbott on Shipp. 401; and see *ante*, § 212.

titled to recover for the loss of the goods. In *Blanchet v. Powell's Collieries Co.* L. R. 9 Ex. 74, which was an action for a lump freight for carrying two hundred and seventeen tons of pit-wood, the defendant pleaded that the plaintiff did not carry all the cargo mentioned in the bill of lading. The plea did not state that all received was not carried. *Held*, that the plaintiff was not estopped even as against an assignee of the bill of lading to show that all that was received was delivered, although the bill of lading did not contain the clause "weight unknown." Bramwell, B., said that in an action against the master for not delivering, he might be estopped to deny the statement in the bill of lading; but Cleasby, B., said that this could not be true of a mere statement of weight, which might vary during the transit. In *West v. Steamboat Berlin*, 3 Clarke, Iowa, 532, although there was no statement of contents unknown, the court held the acknowledgment that the goods were received in good order related only to the external condition of the cases. See also *ante*, § 223 *a*; *Richards v. Doe*, 100 Mass. 524; *Valieri v. Boyland*, L. R. 1 C. P. 382; *Jessel v. Bath*, L. R. 2 Ex. 267.

another. Carriers, thinking it reasonable, began to insist that their employers should, in such cases, pay a rate of remuneration proportionable to the risk undertaken, and they did so by the means just mentioned.¹ But however long continued may have been the practice of giving such notices, their legal validity was not fully established until, at least, as late a period as the year 1785. For this we have the authority of Mr. Justice Burrough, who, in *Smith v. Horne*,² said, "the doctrine of notice was not known until the case of *Forward v. Pittard*,³ which I argued many years ago." That case was decided in the year just mentioned, and it is remarkable that if the question of notice was, in any form, before the court, it should not have been mentioned by the reporter; and the decision was against the carrier, although the loss was occasioned by fire, without his default. The doctrine was not recognized in Westminster Hall until the year 1804, when the case of *Nicholson v. Willan*⁴ was decided, in which Lord Ellenborough said: "The practice of making a special acceptance had prevailed for a long time, and that there was no case to be met with in the books, in which the right of the carrier thus to limit, by special contract, his own responsibility, has ever been by express decision denied." But whatever may have been the rule where there was an express contract, or, in other words, a special contract in fact, the learned judge could not have intended to say that a carrier had for a long time been allowed to limit his liability by a general notice, or that a special contract had been implied from such a notice. Not longer before than the year 1793, Lord Kenyon, in considering obligations created by operation of law, and those created by a party's own act, he puts the case of common carriers, and said, they could not discharge themselves by any act of their own, "as by giving notice, for example, to that effect."⁵

§ 233. The validity of these notices gradually became, however, firmly established in England; and although many learned judges have expressed a regret that they were ever recognized in Westminster Hall,⁶ yet Chief Justice Best, in *Riley v. Horne*, appears

¹ See note to *Coggs v. Bernard*, 1 Smith, Lead. Cas. 225.

² *Smith v. Horne*, 8 Taunt. 144.

³ *Forward v. Pittard*, 1 T. R. 27.

⁴ *Nicholson v. Willan*, 5 East, 507.

⁵ *Hyde v. Trent Navigation*, 1 Esp. 36.

⁶ See a review of the English cases

to think them proper. After adverting to the fact that the common law makes a common carrier liable for every loss except by the act of God and the king's enemies, that learned judge proceeded to say: "As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents, against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at their place of destination, as for the labor and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious, and his journey more expensive, in proportion to the value of his load. If he has things of great value contained in such small packages as to be the objects of theft or embezzlement, a strong and more vigilant guard is required than when he carries articles not easily removed, and which offer less temptations to dishonesty. He must take what is offered to him to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage. The loss of one single package might ruin him. By means of negotiable bills, immense value is now compressed into a very small compass. Parcels containing these bills are continually sent by common carriers. As the law compels carriers to undertake for the security of what they carry, it would be most unjust if it did not afford them the means of knowing the extent of their risk. Other insurers, whether they divide the risk, which they generally do, amongst several different persons, or one insurer undertakes for the insurance of the whole, always have the amount of what they are to answer for specified in the policy of insurance."¹

in *Hollister v. Nowlen*, 19 Wend. 234; and in *Cole v. Goodwin*, 19 Wend. 251.

¹ *Riley v. Horne*, 5 Bing. 217. See also *Walker v. Jackson*, 10 M. & W. 161; and the review of the numerous English cases in *Hollister v. Nowlen*, and *Cole v. Goodwin*, *ub. sup.* In *Wyld v. Pickford*, 8 M. & W. 443, the defendants gave notice to the plaintiff that they would not be liable for loss or damage done to certain goods delivered to them for the purpose of carriage, unless the same were

insured according to their value, and paid for at the time of delivery; which limitation, said Parke, B., who delivered the judgment of the court, "it is competent for a carrier to make, because being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own; and if the proprietor of the goods still chooses that they should be carried, it must be on those terms."

§ 234. Notwithstanding the force of the reasons above advanced by Mr. Justice Best in favor of the equity of the rule, that a common carrier should be allowed to stipulate by a general notice, that they will not be responsible for any loss beyond a certain sum, unless the goods were specially entered and paid for; yet the subject has proved as fruitful a source of legal controversy as the subject of an acknowledgment of debt, or a new implied promise, under the statute of limitations; and the policy of the law has been defeated as much by extravagant equitable constructions in respect to the former subject as in respect to the latter. The reader has only to refer to the cases of *Hollister v. Nowlen*,¹ before cited, and *Cole v. Goodwin*,² to be willing to admit the truth of this assertion; and Mr. Bell, in his Commentaries, adduces evidence of the truth of it: "Of the extravagance," he says, "into which this doctrine has run, and the distracting points which come to be involved in it, the newspapers and the books of reports are full. One carrier frees himself from responsibility for fire;³ another even from the common responsibility of the contract for negligence.⁴ One man is bound by a notice which has appeared in a newspaper that he is accustomed to read;⁵ another person, because a large board was stuck up in his office;⁶ and another is freed from the effect of the notice in the office because handbills were circulated of a different import.⁷ Then, it is said, what if he cannot read? or if he does not go himself, but sends a porter, and he cannot read? Or, what if he be blind, and cannot see the placard? And thus difficulties multiply; the courts are filled with questions, and the public left in uncertainty."⁸ The same learned writer also says: "The unhappy consequences of this doctrine are to be ascribed, as it would seem, to a wrong bias unfortunately admitted in the progress of its establishment from not keeping a steady eye upon the principles which ought to have regulated the practice of giving notices. There seems to be only one point to which, legitimately, notices of carriers could be admitted, viz., the regulation of the consideration for risk.

¹ *Hollister v. Nowlen*, 19 Wend. 234.

² *Cole v. Goodwin*, 19 Wend. 251.

³ *Moving v. Todd*, 1 Stark. 79.

⁴ *Leeson v. Holt*, 1 Stark. 186.

⁵ *Ibid.*

⁶ *Clark v. Gray*, 4 Esp. 177.

⁷ *Cobden v. Bolton*, 2 Camp. 108.

⁸ 1 Bell, Com. 382.

Saving always the power of making an express contract, the effect of a mere notice ought justly to be restricted to this point ; as to which alone it is competent for a carrier to refuse employment. Had this been attended to, the law on this subject would have been conformable to the general system of jurisprudence, and a sort of legislative power never would have been assumed by common carriers. Any exorbitancy of charge would at once have been brought to a true standard by judicial determination ; while the responsibilities of the carrier, under the common law of his contract, and on the principles of public policy, would have remained untouched but by positive agreement in each individual.”¹

§ 235. It is generally admitted, in respect to the subject of notices, first, that a carrier’s general run of goods may be estimated and notice given that he will not be answerable for those of a different description, as jewelry, money, &c., of extraordinary value ; secondly, that for the greater risk attending goods of such a description, and the greater care required, a higher consideration, partly as hire, and partly as insurance, should be given. The English decisions, for the most part, have gone only to this extent ; and although none of them were made at the time of the American Revolution, yet to deny that they are not to enter into and form a part of our own law, limited as above mentioned, would be, according to the opinion and in the words of Mr. Justice Cowen, “ to rise against the united authority of Westminster Hall both before and since the Revolution.”² But there have been some decisions in England, which go to a much greater extent than this, and so far, as to permit a common carrier, without an express contract, and at his own discretion, by a mere general notice, to put an absolute limit on the public duty and responsibility which are imposed upon him by public policy ; and this is the important subject of attention. As was asserted by an English writer more than thirty years ago : “ The lawyer’s discrimination and judgment must be chiefly directed to, and conversant with, the effect of these undertakings by which common carriers have almost entirely divested themselves of the character of public servants, and have endeavored to assume the privileges of special contractors ;

¹ 1 Bell, Com. 382.

² *Cole v. Goodwin*, 19 Wend. 251.
2 Kent, Com. 606, 607.

in direct violation of the policy and in opposition to the first principles of the common-law."¹

§ 236. There are two *nisi prius* decisions in England which allow the carrier to cast off all liability whatever. In *Maving v. Todd*,² the defendant had given notice that he would not answer for a loss by fire, and such a loss having occurred, Lord Ellenborough thought that carriers might exclude their liability altogether, and nonsuited the plaintiff. In *Leeson v. Holt*,³ tried in 1816, the same learned judge made a like decision; though he remarked, that "if this action had been brought twenty years ago the defendant would have been liable; since by the common law a carrier is liable in all cases except two." Here is a very distinct admission of what will be found in many of the English cases, that the courts had departed from the law of the land.

§ 237. Now, admitting the carrier's right so to restrict his responsibility as not to be liable for a loss by fire, happening otherwise than by lightning, by an express contract entered into by the parties, it by no means follows he can do so merely by his own act; or, that it may be inferred from a mere general notice to the public (though brought home to the knowledge of the other party), limiting his obligation, which may or may not be assented to.⁴ The law, as laid down by the court, in *Hollister v. Nowlen*, in New York, and confirmed by the Supreme Court of the United States, in the late case of *The New Jersey Steam Navigation Company v. Merchants' Bank*,⁵ is, that if any implication is indulged in, from the delivery of the goods to the carrier, under the general notice, it is as strong that the owner intended to insist upon his rights, and the carrier's duties, as it is that he assented to their qualification. The carrier is in the exercise of a public duty, a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. The owner of the goods, by entering into an express contract, virtually agrees that in respect to the particular transaction the carrier is not to be regarded as in the exercise of his public employment, but as a private person, who

¹ Jeremy on Carr. 3.

² *Maving v. Todd*, 1 Stark. 72.

³ *Leeson v. Holt*, 1 Stark. 186.

⁴ Jeremy on Carr. 35, 36. *Hollis-*

ter v. Nowlen, 19 Wend. 234. *Cole v. Goodwin*, 19 Wend. 251.

⁵ See opinion of Nelson, J., in *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 How. 344.

incurs no other responsibility than that of an ordinary bailee for hire.¹ This view of the subject is in this country well sustained by authority. (a)

§ 238. The point which was expressly decided, upon great deliberation, in *Hollister v. Nowlen*, in New York, at the May term of the Supreme Court, 1838, was, that stage-coach proprietors and other common carriers could not restrict their common-law liability by a general notice that the "Baggage of Passengers is at the Risk of the Owners." The same point was decided at the same term of the court in *Cole v. Goodwin*,² in which the whole doctrine of notices generally is elaborately and learnedly discussed by Mr. Justice Cowen, and in which the English decisions upon the subject of notices in general are carefully reviewed by that learned judge;³ and the opinion of the learned judge may be interpreted as going even to the extent, that a common carrier cannot exclude his common-law liability by an express contract, as will appear by the following section.

§ 239. The decision in the case of *Gould v. Hill*, in New York, in 1842,⁴ is, that common carriers cannot limit their liability, or evade the consequences of a breach of their legal duties as such, by an express agreement. And accordingly the court decided, that where common carriers, on receiving goods for transportation, gave the owner a memorandum, by which they promised to forward the goods to their place of destination, "danger of fire, &c., excepted," they were liable for a loss by fire, though not resulting from negligence. The opinion of the court was delivered by Cowen, J., who said he should do little more than refer to the

¹ *Ante*, Chap. III.

² *Cole v. Goodwin*, 19 Wend. 251.

³ In the case of *Camden R. v. Belknap*, 21 Wend. 354, the defendant brought an action on the case in the court below (the Superior Court of the city of New York), against the company as common carriers for the loss of baggage. The Chief Justice in the court below charged the jury that notice limiting the liability of the defendants, if it reached the plaintiff or came to his knowledge, controlled the common law. But in

error, in the Supreme Court of the State, Bronson, J., in delivering the opinion of the court, said: "The case was tried before we had formally refused to engraft upon our code the modern English innovation of allowing the carrier to limit his common-law liability, by a notice brought home to the employer." In *Clark v. Faxton*, 21 Wend. 153, it was held the same as in *Hollister v. Nowlen*, and *Cole v. Goodwin*.

⁴ *Gould v. Hill*, 2 Hill, 623.

(a) See *Western Transp. Co. v. Newhall*, 24 Ill. 466.

case of *Cole v. Goodwin*, and the reasons for such opinion as stated in that case. He then proceeded to say: "It was to the effect that I could no more regard a special acceptance as operating to take from the duty of a common carrier than a general one. I collect what would be a contract from both instances, provided it be lawful for the carrier to insist on it; and such is the construction which has been given to both by all the courts. The only difference lies in the different kinds of evidence by which the contract is made out. When the jury have found that the goods were delivered with intent to abide the terms of the general notice, I understand a contract to be as effectually fastened upon the bailor as if he had reduced it to writing. Indeed, the contrary construction would, I think, be to tolerate a fraud on the part of the bailor. The true ground for repudiating the general notice is, therefore, its being against public policy; and this ground goes not only to the evidence,—the mode in which you are to prove the assent,—but to the contract itself. After forbidding the carrier to impose it under the form of a general notice, therefore, we cannot consistently allow him to do the same thing in the form of a special notice or receipt. The consequences to the public would be the same, whether we allow one form or the other."¹

¹ The reasoning of Chief Justice Gibson, in *Atwood v. Reliance Trans. Co.* 9 Watts, 87, was much to the same effect, though the question was not decided. In 1849 it was considered by Bronson, J., in giving the opinion of the Court of Appeals in New York, still a debatable question, whether common carriers and innkeepers can contract for a more restricted responsibility than the law imposes upon them. *Wells v. Steam Nav. Co.* 2 Comst. 204. Of course there is no room to doubt that other bailees may contract (private carriers, for example) for a more restricted responsibility than would be implied against them in the absence of a special contract; and so, in that manner they may become insurers against all possible hazards. *Ibid.* And see *ante*, § 59. The following important

intelligence appeared in the "Boston Daily Advertiser" about the first of October, 1850, and was copied from the "New York Express:" "The General Term of the Court of Common Pleas has decided that a common carrier has a right to make a special contract with those sending goods by him, a rule, the contrary to which has usually hitherto been held. The Merchants' Mutual Insurance Company insured goods for a party at the West, which were placed on board a barge belonging to the Western Transportation Company, and burnt at the great fire at Albany, while on their way. The Insurance Company paid the loss and sued the Transportation Company, contending they were bound to deliver the goods at the place of destination. The printed receipts of the Transportation Company expressly proved that

§ 239 *a*. But since the opinion of the court in the case of *The New Jersey Steam Navigation Company v. Merchants' Bank*,¹ the courts of New York, in the cases of *Parsons v. Monteith*² and *Moore v. Evans*,³ have receded from the doctrine of former cases, so far as respects the competency of a carrier to make a special agreement, and have adopted the views of the United States Supreme Court, in the case first named. The rule may be said to be sustained by authority, that a common carrier may by express contract or agreement with the owner so vary and change his relation as to become a private carrier.⁴

§ 240. In Ohio, the question whether a common carrier could limit his common-law responsibility by notice was first brought before the Supreme Court of that State in 1840, on a special verdict, in the case of *Jones v. Voorhees*,⁵ and the court, upon great deliberation, held, and in their opinion delivered by Wood, J., earnestly insisted, that the proprietors of stage-coaches cannot avoid their responsibility for negligence by actual notice to a traveller, that the baggage is at "his own risk."

§ 241. The doctrine, as above established in New York and in Ohio, is defended by an elaborate opinion of the Supreme Court of Georgia, which was delivered by Nisbet, J., who says: "I have said that a common carrier cannot vary his liability as it existed at common law in 1776, by notice or special acceptance. On account of the importance of this subject, I propose to give it a more minute exposition. This is an age of railroads, steamboat companies, stage companies, locomotion, and transportation. It is an era of stir, — men and goods run to and fro, and common carriers are multiplied. The convenience of the people and safety of property depend more now, I apprehend, upon the rules which regulate the liability of these public ministers than at any other period of the world's history. Steam, as a transporting power, has supplanted almost all other agencies, and it is used for the

they will not be liable for loss by fire. The court holds that said clause is good and valid, and gave judgment for the Transportation Company, no negligence having been shown on their part."

¹ *New Jersey Steamboat Co. v. Merchants' Bank*, 6 How. 344. And see *ante*, § 221.

² *Parsons v. Monteith*, 13 Barb. 358.

³ *Moore v. Evans*, 14 Barb. 624.

⁴ *Kimball v. Rutland R.* 26 Vt. 247. And see *post* § 245. The case of *Gould v. Hill* is also overruled in *Dorr v. New Jersey Steam Nav. Co.* 4 Sandf. 136, 1 Kern. 485.

⁵ *Jones v. Voorhees*, 10 Ohio, 145.

most part by public companies or associations. It is very important that their liability should not only be accurately defined, but publicly declared. Anterior to 1776, the common carrier was an insurer for the delivery of goods intrusted to him, and liable for losses occasioned by all causes except the act of God and the king's enemies, and without the power to limit his responsibility. That this was the law, is proven by the numerous authorities which I have before referred to. No adjudication, before that time, had relaxed its stringent but salutary severity." The learned judge referred to the case of *Forward v. Pittard*, in 1785, as the first case in which the doctrine of notice was recognized, according to Mr. Justice Burrough, in *Smith v. Horne*, and to the case of *Nicholson v. Williams*, in 1804,¹ when it was finally settled by judicial decision; and, referring to the decisions in New York and Ohio, he further observed: "We adhere, then, to the sound principles of the common law, sustained by the courts of our own Union, and hold notices, receipts, and contracts, in restriction of the liability of a common carrier, as known and enforced in 1776, void, because they contravene the policy of law."² (a)

§ 242. In *Hale v. The New Jersey Steam Navigation Company*, in Connecticut,³ it was held, that where a steamboat was in the business of transporting goods from New York to Providence; and the goods were lost in Long Island Sound, near Huntingdon, Long Island; the contract of the parties was to be governed by the law of New York; and that by the law of New York, common carriers could not, by a public notice, restrict the liability imposed upon them by the common law.

§ 243. The doctrine established in the above States, that common carriers cannot exclude their common-law responsibility by a general notice to that effect, or by a notice that the property is at the "risk of the owners," was recognized by the court in *Bennett v. Dutton*, in New Hampshire;⁴ and in Massachusetts, there is no disposition to relax the requisitions of the doctrine of the common law, as applied to common carriers, nor to give counte-

¹ See *ante*, § 232.

² *Fish v. Chapman*, 2 Kelly, 349.

³ *Hale v. New Jersey Steam Nav.*

Co. 15 Conn. 539.

⁴ *Bennett v. Dutton*, 10 N. H. 487.

(a) But see *Cooper v. Berry*, 21 Ga. 526.

nance to ingenious devices, by which its provisions may be evaded.¹ (a) There is also a like indisposition to favor or extend the indulgence of notices in Maine.² The question in *Prentiss v. Barney*, in Maryland,³ was left undecided. In Pennsylvania there are numerous and strong *dicta* against the expediency of allowing any limitation of the carrier's liability.⁴ "Notwithstanding," says Chief Justice Gibson, "the unfortunate direction given to the decisions of an early day, it is still almost susceptible of a doubt, whether an agreement to lessen the common-law measure of a carrier's responsibility, like an agreement to forego a fee-simple tenant's right of alienation, or a mortgagor's right of redemption, is not void by the policy of the law. Though," said he, "it is perhaps too late to say that a carrier may not accept his charge in special terms, it is not too late to say that the policy which dictated the rule of the common law requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them."⁵

§ 244. Finally, that a common carrier cannot exempt himself entirely from the responsibility, or from the duties which the law has annexed to his employment, by a notice published by the carrier, was very lately declared by the Supreme Court of the United States, in the case of the *New Jersey Steam Navigation Company v. The Merchants' Bank*.⁶ The court, in this case, gave their as-

¹ Per Hubbard, J., in *Thomas v. Boston R.* 10 Met. 479.

² Per Weston, C. J., in *Bean v. Green*, 12 Maine, 422.

³ *Barney v. Prentiss*, 4 Harris & J. 317.

⁴ *Beckman v. Shouse*, 5 Rawle, 179. *Eagle v. White*, 6 Whart. 505.

⁵ *Atwood v. Reliance Trans. Co.* 9 Watts, 87. In *Bingham v. Rogers*, 6 Watts & S. 495, it seems to be admitted rather reluctantly, on the authority of *Beckman v. Shouse*, that carriers by land may by special contract limit their responsibility, though in the court below the jury were in-

structed that common carriers could not, by notice, limit their liability as to the safety of the property, though they might by notice brought home to the owner, require the latter to state the nature or value of the property, or might for that purpose make a special acceptance; but they could not by notice rid themselves of the duty imposed by law to be answerable for the property, unless the loss accrued by inevitable accident.

⁶ *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344. See *ante*, §§ 238, 239.

(a) See *Judson v. Western R.* 6 Allen, 486; *Buckland v. Adams Exp. Co.* 97 Mass. 124; *Perry v. Thompson*, 98 Mass. 249; *Gott v. Dinsmore*, 111 Mass. 45.

sent to the law as laid down by the court in *Hollister v. Nowlen*, in New York;¹ and they say: "We lay out of the case the notices published by the respondents, seeking to limit their responsibility; because the carrier cannot in this way exonerate himself from duties which the law has annexed to his employment." The American Reports, therefore, afford additional testimony of the truth of the assertion made by Burrough, J., in *Duff v. Budd*,² viz., that "carriers are constantly endeavoring to narrow their responsibility and to creep out of their duties; and I am not singular in thinking that their endeavors ought not to be favored."

§ 245. Thus, in the words of an eminent legal writer, "the right of a common carrier, by a general notice, to limit, restrict, or avoid the liability devolved on him by the common law, on the most salutary grounds of public policy, has been denied in American courts, after the most elaborate consideration."³ That a common carrier is bound to receive goods offered to him for carriage, we have seen.⁴ But, at the same time, as the learned

¹ The courts of South Carolina appear inclined to give effect to notices which claim to exonerate a common carrier from his common-law liability. *Ante*, §§ 159, 224. In the case of *Singleton v. Hilliard*, 1 Strob. 203, in which the action was to recover damages for the loss of a large number of bales of cotton, that were consumed by fire on the defendants' steamboat, the general legal proposition of the appellants, was, that the ship-owners, Hilliard & Brooks, were exempt from their liability at common law for the accidental loss by fire, by reason of the express notice, that they were not to be held liable for such losses by fire, unless upon payment of certain specified and additional freight. The notice in question, and duly signed by the agent, was as follows: "Steamboat Notice. — The proprietors of the steamboat line plying from Camden and Columbia to Charleston, having made arrangements with the Augusta Insurance and Banking Company, to insure all cotton shipped by their boats from the above places, inform their friends

and the public generally, that bills of lading for cotton will be given by the agents at Camden and Columbia, free of all risks, both from fire and the navigation, without additional charge." Richardson, J., who gave the opinion of the court in reference to this notice, said: "From this advertisement in a Camden paper, I cannot conceive that any one could understand that the shipper had to pay twelve and a half cents on each bale, in order to render the owners of the steamboats liable for losses by fire." Another fact the learned judge mentioned as worthy of notice, which was, the uncertainty of a knowledge on the part of the shippers and their agents, of the advertisement in question in the public papers; and, in short, the court considered the case, "that of a man shipping his cotton on a steamboat, paying customary freight, which cotton has been destroyed in the boat by fire, and the owner of course liable."

² *Duff v. Budd*, 3 Brod. & B. 177.

³ 2 Greenl. Ev. § 215.

⁴ See *ante*, Chap. V.

writer above referred to says, "it is now well settled that a common carrier may qualify his liability by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly."¹ Notwithstanding such notice the owner of the goods has (as before mentioned) a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment.²

§ 246. If the carrier has published two different notices, each of which is before the public at the time of the carriage, that will bind him which is least beneficial to himself; and if, at the time of the carriage, he delivers a written notice without any limita-

¹ See *ante*, § 235. 2 Kent, Com. 606, 607. Story on Bailm. § 557. *Slim v. Great Northern R.* 14 C. B. 647. 26 Eng. L. & Eq. 297. *Chippendale v. Lancashire R.* (Q. B. 1851), 7 Eng. L. & Eq. 395. *Moses v. Boston R.* 4 Fost. 71. *Davidson v. Graham*, 2 Ohio State, 131. For example, the plaintiff delivered a horse to a railroad company, to be by them carried, but upon his doing so, he was required by them to, and did, sign a ticket, which contained the following words: "This ticket is issued subject to the owner undertaking to bear all the risk of injury by conveyance and other contingencies; the company will not be responsible for any damage, however caused, to horses," &c. This, it was held, amounted to a "special contract," and the company were thereby exempted from all liability for any damage that might be occasioned to the horse. *Morville v. Great Northern R.* (Q. B. 1852), 16 Jur. 528; 10 Eng. L. & Eq. 366. In *Orange County Bank v. Brown*, 9 Wend. 115, the court, by Nelson, J., say, that "if he" (the

carrier) "has given general notice that he will not be liable over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance paid, such notice, if brought home to the knowledge of the owner, is as effectual in qualifying the acceptance of the goods, as a special agreement, and the owner, at his peril, must disclose the value, and pay the premium; and the carrier, in such case, is not bound to make the inquiry." The only modification which the Supreme Court of Georgia would admit, of the rule of responsibility of a common carrier at common law, by a general notice, is as above stated in the text. *Fish v. Chapman*, 2 Kelly, 349. See also the modern English case of *Wyld v. Pickford*, 8 M. & W. 443; and the earlier English cases referred to in *Hollister v. Nowlen*, 19 Wend. 234; and *Cole v. Goodwin*, 19 Wend. 251. And see *ante*, § 234.

² See *Hollister v. Nowlen*, 19 Wend. 234; *Kimball v. Rutland R.* 26 Vt. 247.

tion of responsibility, that nullifies his prior notice containing a limitation.¹

§ 247. In all cases where the notice cannot be brought home to the person interested in the goods, directly or constructively, it is a mere nullity; and the burden of proof is on the carrier to show that the person with whom he deals is fully informed of the terms and effect of the notice.² When the notice is thus brought home, in the absence of all contravening circumstances, it is deemed proof of the contract between the parties, and is then to be construed like every other written contract; and, so far as the exceptions extend, they convert the general law into a qualified responsibility.³ (a)

§ 248. The most usual evidence to show that the plaintiff has had notice of the defendant's terms has been by proof that a notice was put up in the office where the goods were received and entered for the purpose of carriage, in so conspicuous a situation that it must (unless he were guilty of wilful negligence) have attracted the attention of the plaintiff or his agent;⁴ and the printed conditions of a line of public coaches were held to be made sufficiently known to passengers by being posted up at the place where they book their names.⁵ But this proof fails where the party who delivers the goods at the office cannot read.⁶ If courts admitted the validity of mere presumptive notices, they and juries would be continually perplexed by a thousand nice questions. Thus if a notice posted upon the walls of the office of delivery is to be held *prima facie* evidence that it has been read by the bailor, the rule certainly will not prevail if he happen to

¹ *Munn v. Baker*, 2 Stark. 255.
Cobden v. Bolton, 2 Camp. 108.

² Story on Bailm. § 560. 2 Greenl. Ev. § 216. *Hollister v. Nowlen*, 19 Wend. 234. *Brooke v. Pickwick*, 4 Bing. 218. *Beckman v. Shouse*, 5 Rawle, 189. *Sager v. Portsmouth R.* 31 Maine, 228. *Farmers' Bank v. Champlain Trans. Co.* 23 Vt. 186.

Great Western R. v. Goodman, 12 C. B. 313; 11 Eng. L. & Eq. 546.
Camden R. v. Baldauf, 16 Penn. State, 67.

³ *Ibid.*

⁴ 2 Starkie, Ev. 338.

⁵ *Whitesell v. Crane*, 8 Watts & S. 369.

⁶ *Davis v. Willan*, 2 Stark. 279.

(a) *Walker v. York R.* 2 Ellis & B. 750; 22 Eng. L. & Eq. 315. A notice posted on a steamboat that the owners will not be responsible for baggage, unless it is checked, will not protect them against the claim of a passenger, if, on demand, a check is refused. *Freeman v. Newton*, 3 E. D. Smith, 246.

be very near-sighted, and so unable to read the notice.¹ Where the goods were delivered by a porter, who admitted that he had frequently been at the defendant's office, and that he had seen a printed board, but did not suppose that it contained any thing material, and, in fact, had never read it, it was held that, although the board in fact contained a notice, the evidence of notice was insufficient; and that it was incumbent on a party who wished to lessen his common-law responsibility, to give effectual notice.² So there was a failure of proof where the notice at the office at Cheltenham stated the advantage of carriage by the particular wagon, in large letters, and the notice of non-responsibility, in small characters,³ although at the terminus of the carrier's route notice was given at the office by means of a board inscribed with large letters. So also where goods are not delivered at the office where the notice is exhibited, but are delivered into a cart sent round to receive goods;⁴ or, at an intermediate stage between the two places, from each of which the carrier conveys goods to the other, if there be no notice at the place of delivery; although notices are suspended at the two termini.⁵

§ 249. Another usual mode of proof of notice, is by evidence, that the notice was given by printed cards, or by advertisements in the public newspapers; but this is insufficient, unless it be proved that the plaintiff has seen such cards, or read the newspapers;⁶ or is accustomed to read the newspapers so as to lay a foundation for presuming knowledge.⁷ If the carrier relies on the distribution of printed handbills, he must show that one of them was actually delivered to the owner, or to the person bringing the goods for conveyance.⁸

§ 250. It was said by Best, J., in *Brooke v. Pickwick*:⁹ "If coach proprietors wish honestly to limit their responsibility they

¹ See Law Rep. for September, 1852.

² *Kerr v. Willan*, 2 Stark. 53.

³ *Butler v. Heane*, 2 Camp. 415.

⁴ *Clayton v. Hunt*, 3 Camp. 27.

⁵ *Gouger v. Jolly*, 1 Holt, 317.

⁶ 2 Stark. Ev. 338. *Jenkins v. Blizard*, 1 Stark. 418. *Clayton v. Hunt*, *ub. sup.* *Leeson v. Holt*, 1 Stark. 186.

⁷ *Ibid.*, and *Rowley v. Horne*, 3

Bing. 2. *Griffiths v. Lee*, 1 Car. & P. 110.

⁸ *Palmer v. Grand Junction R.* 4 M. & W. 749. Parol evidence is admissible to show the contents of a handbill put up in a stage-office four years before, containing a notification of limited responsibility. *Whitesell v. Crane*, 8 Watts & S. 369.

⁹ *Brooke v. Pickwick*, 4 Bing. 218.

ought to announce their terms to every individual who applies at their office, and, at the same time, place in his hands a printed paper specifying the precise extent of their engagement. If they omit to do this they attract customers under the confidence inspired by the extensive liability which the common law imposes upon carriers, and then endeavor to elude that liability by some limitation which they have not been at the pains to make known to the individual who has trusted them." This course received the full approbation of the court, by Bronson, J., in *Hollister v. Nowlen*.¹ The usual practice of railway companies in England, in respect to this subject, is, upon the receipt of the goods, to deliver a ticket explaining the terms upon which the company are willing to accept them. Proof of the delivery on the one side, and the acceptance on the other, of such a ticket, is sufficient to constitute a special contract; but if there is no proof of the production and delivery of the ticket to the other party the ground of exemption fails, and the company consequently must be taken to stand on the ordinary footing of carriers at common law.² (a)

§ 251. A notice known to the owner of the goods binds him in respect to all his agents who send goods by the same carrier.³ And, on the other hand, a notice known to the porter, messenger, or agent of the owner of the goods is notice to him notwith-

¹ *Hollister v. Nowlen*, 19 Wend. 234.

² Walf. Sum. of Laws of Railways, 308.

³ Story on Bailm. § 558. *Mayhew v. Eames*, 3 B. & C. 601. *Mav-*

ing v. Todd, 1 Stark. 72. *Clark v. Hutchins*, 14 East, 475. *Great Western R. v. Goodman*, 12 C. B. 313; 11 Eng. L. & Eq. 546. *Great Northern R. v. Morville* (Q. B. 1852), 21 L. J. (N. S.) Q. B. 319.

(a) There is no legal presumption that rules printed on the back of a passenger ticket are read by the passenger, and they do not, unless read, constitute notice to him. *Brown v. Eastern R.* 11 Cush. 97. See also *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470. This case is commented on in *Harris v. Great Western R.* 1 Q. B. D. 515, and in *Parker v. South Eastern R.* 1 C. P. D. 618. The rule is the same where the words "look on the back" are printed in small type on the face of the ticket. *Malone v. Boston R.* 12 Gray, 388. So where the general object of the ticket is printed in large letters and the restriction in small. *Verner v. Sweitzer*, 32 Penn. State, 208. See *Nevins v. Bay State Steamboat Co.* 4 Bosw. 225. That the words on the ticket of a passenger "carried gratuitously" are evidence of a contract, see *Perkins v. New York R.* 24 N. Y. 196. See also *post*, § 528, n.

standing the owner is personally ignorant of such notice ;¹ (a) for indeed the maxim that the principal is civilly bound by the acts

¹ *Bean v. Green*, 12 Maine, 422. *chants' Bank*, 6 How. 344. And see *Baldwin v. Collins*, 9 Rob. La. 468. *ante*, §§ 91, 98. *New Jersey Steam Nav. Co. v. Mer-*

(a) In *Grace v. Adams*, 100 Mass. 505, it was held that the receipt without dissent by a consignor of a bill of lading, containing a clause stipulating against loss by fire, amounted to a special contract, although the consignor did not read it; and it was said that the rule would be the same where the delivery was made and the receipt accepted under ordinary circumstances by a special or general agent of the owner, not a mere servant or porter, and who might be regarded as clothed with authority to bind the owner in giving instructions and making conditions affecting the transportation. The cases of *Buckland v. Adams Exp. Co.* 97 Mass. 124; *Perry v. Thompson*, 98 Mass. 249; and *Fillebrown v. Grand Trunk R.* 55 Maine, 462, were distinguished. See also *Pemberton Co. v. New York Central R.* 104 Mass. 144; *Boorman v. American Exp. Co.* 21 Wis. 152. In Illinois the mere receipt without dissent of a bill of lading, containing a clause limiting the carrier's liability, does not amount to an assent to its terms. *Adams Exp. Co. v. Haynes*, 42 Ill. 89. *American Exp. Co. v. Schier*, 55 Ill. 140, 150. *Illinois Central R. v. Frankenberg*, 54 Ill. 88, 98. See also *Southern Exp. Co. v. Newby*, 36 Ga. 635; *Prentice v. Decker*, 49 Barb. 21; *Limburger v. Westcott*, 49 Barb. 238; *Belger v. Dinsmore*, 51 Barb. 69. In *Strohn v. Detroit R.* 21 Wis. 554, it was held that evidence of a shipment under a special oral agreement was admissible to rebut the presumption raised by the possession of a receipt delivered several days after the shipment. In *Hoadley v. Northern Transp. Co.* 115 Mass. 304, goods were delivered to a carrier in Illinois to be transported to Boston, and a bill of lading given which contained an exemption from liability for loss by fire. The goods were destroyed by fire. Suit was brought in Massachusetts, and the jury found specially that the shipper did not assent to the exemption against loss by fire. The court *held*, that whether the shipper assented was a question of evidence, and was therefore to be determined by the *lex fori*, and that the case of *Grace v. Adams*, *supra*, governed. In *Railroad Co. v. Manuf. Co.* 16 Wall. 318, the court *held*, that although a common carrier may limit his liability by a special contract assented to by the consignor, yet that an unsigned general notice on the back of the receipt did not amount to such a contract, though the consignor took the receipt without dissent. The receipt in this case stated on its face that the goods were to be transported subject to the rules and regulations of the company, "a part of which notice is printed on the back hereof." In Michigan it is provided by statute that "no railroad company shall be permitted to change or limit its common-law liability as a common carrier by any contract, or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or the shipper of the goods to be carried." St. 1871, § 2386. In Iowa, where a similar statute exists, goods were delivered to be carried to Illinois,

of his agents universally prevails, both in courts of law and equity;¹ it being taken for granted that the principal knows whatever the agent knows.² But a knowledge of notice by a postmaster to whom a trunk is delivered by the plaintiff's servant, to be by him delivered to a stage-driver, will not affect the owner of the trunk if the knowledge has not been communicated to him or to his agent or servant, by the postmaster.³

§ 252. Where several persons are carriers as partners, and publish a notice, and one of the partners afterwards undertakes without any communication with, or knowledge of, the others, to carry packages for a particular person, free of expense, it seems⁴ that such a contract is not binding on the partnership, in derogation of their notice; that is, if such act is not within the scope of his authority, or is done by connivance in fraud of their rights.⁵

§ 253. Had carriers, by a general consent, adopted one certain approved legal form of notice to qualify their responsibility in extraordinary cases, few rules of construction of notices would have been necessary, and few difficulties would have arisen in determining when the circumstances of any case came within the general rules of exception. But as carriers have in general adopted each a peculiar form of notice, the cases have been decided in reference only to, and upon a construction of, such particular notices. Hence, it has seldom happened in England, that one case affords a parallel or precedent for another, which arises upon a differently worded limitation.⁶ In one case, where the terms of the contract were, that "cash, plate, jewels, &c., would not be accounted for, if lost, of more than £5 value, unless entered as such, and paid for," the carrier was not held liable for any loss whatever, in case the goods exceeded the specified value, and no

¹ As per Lord Kenyon, C. J., in *Doe v. Martin*, 4 T. R. 66.

² As per Ashhurst, J., in *Fitzherbert v. Mather*, 1 T. R. 12. And see also *Anderson v. Highland Turn. Co.* 16 Johns. 88.

³ *Bean v. Green*, 3 Fairf. 422.

⁴ Story on Bailm. § 559.

⁵ *Bignold v. Waterhouse*, 1 Maule & S. 255. *Helsby v. Mears*, 5 B. & C. 504.

⁶ See Jeremy on Carr. 45; *Hollister v. Nowlen*, 19 Wend. 34; *Cole v. Goodwin*, 19 Wend. 251; and *ante*, § 234.

under a contract by which the carrier sought to limit his liability. *Held*, that the validity of the limitation was to be determined by the law of Iowa. *McDaniel v. Chicago R.* 24 Iowa, 412.

entry or payment of the increased value had been made.¹ In another case, where the terms of the notice were, that "no more than £5 will be accounted for, for any goods or parcels delivered at this office, unless entered as such, and paid for accordingly," the plaintiff was allowed to retain his verdict for £5, as a limited amount of damages recoverable by him under the conditions of this contract.² (a)

§ 254. It is very obvious, as has been truly said, that "it is of great practical importance to carriers to fix the terms of their notices in such a manner as to avoid all ambiguity; as, in all cases of doubt, they will be construed unfavorably to the carrier."³ Where the notice of a stage company related solely to the baggage of passengers, it was contended that the notice extended not only to the baggage, but included also goods and merchandise under the superintendence of the carrier, but the court refused to accede to such a construction; and they said that if the defendants wished to be understood as they insisted, it was certainly not unreasonable to require something more explicit, and less liable to ambiguity than what the notice on which they relied contained.⁴

¹ *Clay v. Willan*, 1 H. Bl. 298. And see *Hutton v. Bolton*, there cited.

² *Clarke v. Gray*, 6 East, 564.

³ *Jeremy on Carr.* 47. And see *Story on Bailm.* § 556.

⁴ *Beckman v. Shouse*, 5 Rawle, 179. An action was brought against common carriers, being the proprietors of a line of stage-coaches running between Baltimore and Philadelphia, for the transportation of passengers and goods and merchandise for hire, for negligence in not delivering a case of goods, delivered by the plaintiff at the stage-office, and entered on the way-bill for transportation. The defendant had published in the various newspapers printed in B. (and which advertisement was known to the plaintiff) the time when the stages would start from, and arrive at, the respective cities, and the publication contained also these clauses: "Fare and

allowance of baggage as usual. All baggage at the risk of the owners thereof." "All the baggage over twenty pounds will hereafter positively be charged, and be at the risk of the owners thereof." It was *held*, that if the owners of stage-coaches, which carry not only passengers and their baggage, but goods which the owner does not accompany, can by their publications exempt themselves from their liability, which the court did not mean to decide, then such publication should, in that respect, be plain and explicit. That in this case the defendants' advertisement was in doubtful and ambiguous language, and that they were as responsible for the loss of the goods as if no advertisement had been published by them. *Barney v. Prentiss*, 4 Harris & J. 317. *Dwight v. Brewster*, 1 Pick. 50.

(a) *Newstadt v. Adams*, 5 Duer, 43.

§ 255. A general inclination of the public to avoid their subjection to extortion by the power allowed to carriers of thus fixing the additional premium on valuable goods, and a consequent general neglect to give the information required, carriers, instead of being what they originally were intended, proved arbitrary extortioners, and successful evaders of the common-law policy. The interests of commerce demanded the legal enforcement of some gradual scale of price, proportionate to the value or bulk of the articles; and thereby control the power which carriers had assumed.¹ These considerations, together with that of the difficulty of proving the notice to have come to the knowledge of the other party, at length induced the English Parliament to interfere, by the statute 11 Geo. IV., and 1 Wm. IV. c. 68; a statute which has, to some extent, as relates to carriers by land, restored the operation of the common law.² By thus substantially reasserting the rule of the common law, it has been considered that relief has been afforded both to the courts and to the public; and that, if the people of Great Britain, “after a long course of legal controversy, have retraced their steps and returned to the simplicity and certainty of the common-law rule, we (in this country) ought to profit by their experience.”³ (a)

§ 256. The statute above referred to (the adoption of the provisions of which is so decidedly recommended) is entitled “An Act for the more effectual protection of mail contractors, stage-coach proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof.” It recites that, “by reason of the frequent practice of bankers and others, of sending

¹ Jeremy on Carr. 41.

of the court in *Hollister v. Nowlen*,
19 Wend. 234.

² Story on Bailm. § 554.

³ Bronson, J., in giving the opinion

(a) If there is an entire contract to carry partly by land and partly by sea, as to the land journey the act applies. *Le Conteur v. London R. L. R.* 1 Q. B. 54. *Baxendale v. Great Eastern R. L. R.* 4 Q. B. 244. See also act of 1854, 17 & 18 Vict. c. 31; *Simons v. Great Western R.* 18 C. B. 805, 37 Eng. L. & Eq. 286; *London R. v. Dunham*, 18 C. B. 826, 37 Eng. L. & Eq. 299; *Pardington v. South Wales R.* 1 H. & N. 392, 38 Eng. L. & Eq. 432; *Wise v. Great Western R.* 1 H. & N. 63, 36 Eng. L. & Eq. 574; *Zunz v. South Eastern R. L. R.* 4 Q. B. 539. This statute is considered at length in *Peek v. North Staffordshire R.* 10 H. L. Cas. 473. And see *post*, § 257.

by the public mails, stage-coaches, wagons, vans, and other public conveyances by land, for hire, parcels and packages containing money, bills, notes, jewelry, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire is greatly increased; and that, through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledges of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses;” it is therefore enacted in section 1, that no mail contractor, stage-coach proprietor, or other common carriers by land, for hire, shall be liable for the loss of, (a) or injury to, any article of property of the description following; that is to say, gold or silver coin of this realm, or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, clocks, or timepieces of any description, (b) trinkets, (c) bills, notes of the governor and company of the banks of England, Scotland, and Ireland, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, (d) gold or silver plate, or plated articles, glass, (e) china, silks in a manufactured (f) or unmanufactured state, and whether wrought up or not wrought up with other materials, (g)

(a) See *Hearn v. London R.* 10 Exch. 793, 29 Eng. L. & Eq. 494; *Pianciani v. London R.* 18 C. B. 226, 36 Eng. L. & Eq. 418.

(b) This includes a chronometer for use on shipboard. *Le Conteur v. London R. L. R.* 1 Q. B. 54.

(c) As to the meaning of this word, see *Bernstein v. Baxendale*, 6 C. B. (N. S.) 251.

(d) *Morritt v. North Eastern R.* 1 Q. B. D. 302. *Way v. Great Eastern R.* 1 Q. B. D. 692.

(e) See *Bernstein v. Baxendale*, 6 C. B. (N. S.) 251.

(f) *Ibid.*

(g) See *Brunt v. Midland R.* 2 H. & C. 889.

furs, or lace ; (a) or any of them, contained in any parcel or package, (b) which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such article or articles, or property contained in such parcel or package, shall exceed the sum of ten pounds ; unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, coach proprietor, or other common carrier, or to his, her, or their bookkeeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles, or property, shall have been declared¹ by the person sending or delivering the same, and such increased charge as is hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package. The second section enacts, that when any parcel or package containing any of the said articles shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the

¹ The following alphabetical list of the above articles may be found useful:—

Bank-notes. Bills of exchange.
Checks on bankers. China.

Clocks. Coin (gold or silver) of this country, of a foreign state.

Deeds. Engravings. Foreign coins (gold or silver).

Furs. Glass.

Gold coin, or other gold (manufactured or not), or gold plate, or plated articles.

Jewelry. Lace. Maps.

Money (coins) or orders, notes, or securities for payment of money.

Notes of banks of England, Scotland, or Ireland, or other bank in

Great Britain or Ireland, or notes for payment of money.

Orders for payment of money.

Paintings. Pictures. Plate (gold or silver).

Plated articles. Precious stones. Promissory notes.

Securities for payment of money.

Silks in a manufactured or unmanufactured state, or wrought up or not with other articles.

Silver, silver coin, or silver plate, or plated articles.

Stamps (English or foreign). Stones (precious).

Timepieces of any description.

Title-deeds. Trinkets. Watches. Writings.

(a) *Treadwin v. Great Eastern R. L. R.* 3 C. P. 308.

(b) See *Treadwin v. Great Eastern R. L. R.* 3 C. P. 308; *Henderson v. London R. L. R.* 5 Ex. 90; *Whaite v. Lancaster R. L. R.* 9 Ex. 67.

office, warehouse, or other receiving house, when such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid, over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles at such office shall be bound by such notice, without further proof of the same having come to their knowledge. By the third section, when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted, (a) the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured (which receipt shall not be liable to any stamp duty); and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier, as aforesaid, shall not be entitled to any benefit or advantage under the act; but shall be liable as at the common law, and be liable to refund the increased rate of charge. The fourth section provides that no public notice or declaration shall limit or in anywise affect the liability at common law of any of such mail contractors, stage-coach proprietors, or other public common carriers, for or in respect of any goods to be carried and conveyed by them; but that they shall be liable, as at the common law, to answer for the loss of, or injury to, any articles and goods, in respect whereof they may not be entitled to the benefit of the act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding. Section sixth provides that nothing in the act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage-coach proprietor, or common carrier, and any other parties, for the conveyance of goods. (b) By the

(a) Under this section, if the shipper of goods declares their nature and value, he is not bound to tender, but the carrier must demand, the increased charge; and if no such demand is made the carrier is liable for a loss, although the increased charge is not made. *Behrens v. Great Northern R.* 6 H. & N. 366; 7 H. & N. 950.

(b) *Baxendale v. Great Eastern R. L. R.* 4 Q. B. 244.

seventh section it is enacted that where any parcel or package shall have been delivered at any such office, and the value and contents declared, and the increased rate of charges been paid, and such parcel or package shall have been lost or damaged, the party entitled to recover damages in respect thereof shall also be entitled to recover back such increased charges in addition to the value of such parcel or package. The eighth section provides that nothing in the act shall protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant, in his employ, nor protect any such coachman, guard, bookkeeper, or other servant from liability for any loss or injury occasioned by his own personal neglect or misconduct. By the ninth section, such mail contractors, stage-coach proprietors, or other common carriers for hire, are not to be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require from the plaintiff proof of the actual value of the contents by the ordinary legal evidence; and that the mail contractors, stage-coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges.

§ 257. In regard to the general effect of the above act, 1st, it relates solely to carriers by land; (a) 2dly, it extends to the particular articles enumerated only in case their aggregate value exceeds £10; 3dly, that it exempts the carrier from his common-law responsibility as to such goods (unless the loss arise from the felony of his servants) (b) only in the event of his affixing a public and conspicuous notice in the receiving office, notifying the

(a) Neither the Carrier's Act, 11 Geo. 4, & 1 Will. 4, c. 68, nor the Railway and Canal Act, 17 & 18 Vict. c. 81, applies to carriers by sea. *Peninsular Steam Nav. Co. v. Shand*, 3 Moore, P. C. (N. S.) 272. But, by the St. 31 & 32 Vict. c. 119, the provisions of the St. 17 & 18 Vict. c. 81, extend to steam vessels and the traffic thereby. See *Cohen v. South Eastern R.* 1 Ex. D. 217.

(b) See *Metcalf v. London R.* 4 C. B. (N. S.) 307; *Great Western R. v. Rimell*, 6 C. B. (N. S.) 916; *Vaughton v. London R. L. R.* 9 Ex. 93; *M'Queen v. Great Western R. L. R.* 10 Q. B. 569; *Way v. Great Eastern R.* 1 Q. B. D. 692.

extra charges for carrying such valuable articles, or in the event of a special contract; 4thly, that if the notice be affixed, although not seen by the consignor or owner, the carrier is not responsible as to the enumerated description of goods (if the loss do not arise from the felony of his servants), unless the value and nature of the goods be made known, and the increased or insurance rate of charge for carriage, or an agreement to pay it, be accepted by the carrier; but the refusal to give on demand a receipt for the goods and extra charge deprives him of the protection of the act; 5thly, that as to all goods not specifically mentioned in the act, and as to goods of the description therein mentioned, when the value of the latter is not above £10, the common-law liability remains, although such notice be given, or any public notice or declaration be made or given, by the carrier attempting to vary such liability; 6thly, that the act does not preclude the parties from entering into a special contract as to the conveyance of goods of any description or value; and under the act, the merely giving the public notice, though known to the consignor or owner of the goods, cannot be deemed to constitute a special contract for this purpose; and 7thly, it seems that if the loss or injury be occasioned by the personal neglect or misconduct of the coachman, guard, bookkeeper, or other servant of the carrier, in a case in which the carrier himself is not responsible, such coachman, &c., may be sued by the owner of the goods for the consequent damage.¹(a)

¹ Chit. on Cont. 493. For an analysis of this statute, by Bronson, J., see *Hollister v. Nowlen*, 19 Wend. 234. As to the special plea, under it, in *Boys v. Pink*, 8 Car. & P. 361, the declaration stated, that the defendants were common carriers of goods by a van from Bristol to London, and that they so being such carriers, received from the plaintiff a box containing certain goods, to wit, prints and colored prints to be safely carried by the defendants from Bristol to London, and that the defendants, not

(a) A by-law of a railroad company repugnant to an act of Parliament is void. *Williams v. Great Western R.* 10 Exch. 15; 28 Eng. L. & Eq. 439. The 17 & 18 Vict. c. 31, § 7, makes void all notices, conditions, and declarations, made and given by a railway or canal company, unless such as the court or the judge trying the cause may adjudge to be just and reasonable. This has been held to extend to cases where a special contract has been signed in conformity with the subsequent provisions in the statute. *Simons v. Great Western R.* 18 C. B. 805. *Peek v. North Staffordshire R.* Ellis, B. & E. 958; 10 H. L. Cas. 473. *M'Manus v. Lancashire R.* 4 H. & N. 327. This last case

§ 258. In further considering the subject of notices, it becomes proper to consider the effect of misrepresentation, fraud, and con-

regarding their duty, did not convey the goods safely, but, on the contrary, so negligently conducted themselves, that the goods were spoiled. Pleas: first, Not guilty; and second, a special plea founded on the statute: "And for further plea, the defendants say, that the said prints and colored prints in the said declaration mentioned, at the time of the said delivery thereof to the defendants, were engravings, and that the said delivery in the declaration mentioned, of the said box, containing the said goods and chattels, was a delivery thereof to the defendants as common carriers by land of goods for hire, to a certain servant of the defendants, and at a certain office and receiving house of the defendants, situate at Bristol aforesaid, and that the value of the goods and chattels contained in the said box, at the time of the said delivery thereof as aforesaid, exceeded the sum of ten pounds, and amounted, to wit, to the said sum of two hundred pounds, in the said declaration mentioned. And the defendants further say, that at the time of the said delivery of the said box and its contents as aforesaid, for the purpose of their being carried as aforesaid, the value and nature of

the said goods and chattels were not declared by the plaintiff or the person sending or delivering the same, nor was such increased charge as is hereinafter mentioned, nor any engagement to pay the same, accepted by the defendants, or either of them, or the person receiving the said box and its contents as aforesaid; and the defendants further say, that before the time when the said box and its contents aforesaid were so delivered to, and received by, the defendants as such carriers as aforesaid, the defendants had caused to be affixed, in the said office and receiving house, according to the form of the statute in such case made and provided, in legible characters, in a public and conspicuous part of the said office and receiving house, a notice, whereby they, the defendants, stated and notified that certain increased rates of charge, therein mentioned, specified, and stated, were required to be paid, over and above the ordinary rate of carriage, as a compensation for the greater trouble and care to be taken for the safe conveyance of a parcel or package containing engravings of a value exceeding ten pounds, and this the defendants are ready to verify."

was in the Exchequer Chamber, and overrules *Wise v. Great Western R.* 1 H. & N. 63, and *Pardington v. South Wales R.* 1 H. & N. 392. See also *Lewis v. Great Western R.* 5 H. & N. 867; *Beal v. South Devon R.* 5 H. & N. 875; *Garton v. Bristol R.* 1 Best & S. 112; *M'Cance v. London R.* 7 H. & N. 477; *In re Baxendale*, 11 C. B. (N. S.) 787; *In re Baxendale*, 12 C. B. (N. S.) 758; *In re Palmer*, L. R. 1 C. P. 588; *Rooth v. North Eastern R. L. R.* 2 Ex. 173; *Lord v. Midland R. L. R.* 2 C. P. 339. A contract that animals shall be carried "at owner's risk" does not absolve a carrier from the consequences of an unreasonable delay. *Robinson v. Great Western R.* 35 Law J. (N. S.) C. P. 123. So held also as to goods. *D'Arc v. London R. L. R.* 9 C. P. 325. A stipulation in a contract of carriage of the baggage of troops, that it is to remain in charge of a guard provided by the troops, "the company accepting no responsibility," does not exempt the carrier from liability for a loss arising wholly from his own negligence. *Martin v. Great Indian R. L. R.* 3 Ex. 9.

concealment of the owner of the goods, in respect to the nature, amount, and value of them. It is plainly the duty of every person sending goods by a common carrier, in the absence of notice, not to practise such imposition and deception upon him as will add to his risk and lessen his requisite care and diligence; and any false statement or unfair concealment, or material suppression of facts, whereby the carrier is misled, will exempt him from the responsibility of a common carrier.¹(a) "In the absence of notice," says Mr. Justice Nelson, "if any means are used to conceal the nature of the article, and thereby the owner avoids paying a reasonable compensation for the risk, this unfairness, and its consequence to the carrier, upon the principles of common justice, will exempt him from responsibility; for such a result is alike due to the carrier, who has received no reward for the risk, and to the party who has been the cause of it, by means of disingenuousness and unfair dealing."²

§ 259. Whenever the owner of a package represents the contents of it to the carrier, to be of a particular value, he will not be permitted, in case of a loss, to recover from the carrier, at the most, any amount beyond that value.³(b) Where a carrier received two bags of money sealed up, and he was told that they contained £200, and a receipt was given, charging 10s. per cent. for carriage and risk, and the bags of which the carrier was robbed contained £400, it was held that the plaintiff could not recover more than £200;⁴ and it may be doubted whether the defendant would now be considered as liable even to that extent, and whether the whole contract would not be considered as avoided, and rendered a nullity, by the fraudulent representation.⁵

¹ 2 Kent, Com. 603, 604. Story on Bailm. § 565. Edwards v. Sherratt, 1 East, 604. Batson v. Donovan, 4 B. & Ald. 21. Titchburne v. White, 1 Stra. 145. Relf v. Rapp, 3 Watts & S. 21.

² Per Nelson, J., in Orange County Bank v. Brown, 9 Wend. 116.

³ Story on Bailm. § 565. And see the authorities cited, *ante*, to § 258; and Riley v. Horne, 5 Bing. 217.

⁴ Tyly v. Morrice, Carth. 485.

⁵ 2 Stark. Ev. (Eng. ed. 1842) 293. Story on Bailm. § 565. Harris v. Packwood, 3 Taunt. 264. Bull. N. P. 71. See also cases cited in Hollister

(a) Coxe v. Heisley, 19 Penn. State, 243. Chicago R. v. Thompson, 19 Ill. 78. So, if a package containing glass is delivered to a carrier, he should be informed of its contents. American Exp. Co. v. Perkins, 42 Ill. 458.

(b) M'Cance v. London R. 7 H. & N. 487.

§ 260. There is another old case, which turned on the doctrine of unfair representation by the owner of the property, and which has been often cited by the courts, and is introduced by Story, in his very learned and valuable work on Bailments.¹ It was an action on the case, brought against a country carrier for not delivering a box with goods and money in it. The evidence was, that the plaintiff delivered the box to the carrier's porter, whom he appointed to receive goods for him, and told the porter that there was a book and tobacco in the box, when, in fact, there was £100 besides in the box. It was agreed by the counsel, and given in charge to the jury, that if a box, with money in it, be delivered to a carrier, he is bound to answer for it, if he be robbed, although it was not told him what was in it. But Lord Chief Justice Rolle directed the jury, that although the plaintiff did tell him of some things in the box only, and not of the money, yet he must answer for it, for he need not tell the carrier all the particulars in the box; but it must come on the carrier's part to make a special acceptance. But, in respect of the intended cheat to the carrier, he told the jury they might consider him in damages; notwithstanding which, the jury gave £97 against the carrier for the money only (the other things being of no considerable value), abating only £3 for carriage.² There may well be a difficulty in accounting for the finding of the jury in this case.³

§ 261. It is well established that the owner of the goods, or the person delivering them, must take care not to do or say any thing which shall tend to mislead the carrier in respect to the requisite care to be taken of them.⁴ If the owner adopts a disguise for his box, which is calculated to prevent the carrier from taking the particular care of it which the real nature and value of its contents demand, he cannot recover in case of loss, even in

v. Nowlen, 19 Wend. 234; and Cole v. Goodwin, 19 Wend. 251.

¹ Story on Bailm. § 565 a.

² Kenrig v. Eggleston, Aleyn, 93.

³ The reporter has added, "*quod durum videbatur circumstantibus*." The remark of the reporter, says Story (Bailm. § 565 a), "seems well founded; and it is difficult to account for the verdict of the jury, unless upon the supposition, that they were

of opinion that there was some fraud in the carrier." Lord Mansfield, speaking of the reporter's note, said upon one occasion: "Now I own, that I should have thought this a fraud, and I should have agreed in opinion with the *circumstantibus*." Gibbon v. Paynton, 4 Burr. 2301.

⁴ 2 Kent, Com. 602-604. See also Hollister v. Nowlen, 19 Wend. 234; and Cole v. Goodwin, 19 Wend. 251.

the case of gross negligence, beyond the value of the box itself;¹ as, for example, by labelling a box or a trunk, as containing articles of a different nature and inferior value from what are its real contents.² (a)

§ 262. The case of *Orange County Bank v. Brown*, in New York,³ which has been already noticed,⁴ is in accordance with the incontrovertible principle that no person has a right, by practising concealment or fraud, to impose a duty upon another, which he would not, if acting advisedly, have undertaken. That was a case in which a traveller's trunk contained \$11,250, and the plaintiff sought to recover it as a part of the baggage lost. The court held that it did not fall within the commonly received import of the term "baggage;" and that an attempt to have it carried free of reward, under cover of "baggage," was an imposition upon the carrier; that he was thereby deprived of his just compensation, besides being subjected to unknown hazards. The principle of this case was applied in the case of *Pardee v. Drew*, in the same State,⁵ in which it was held that a carrier was not liable for the loss of a trunk which contained valuable merchandise, and nothing else. The court, by Nelson, J., would not say that the plaintiff intended to impose upon the defendant, and under the cover of "baggage," to obtain the transportation of merchandise free of expense, for that was not material; it was sufficient that that was the practical effect of his conduct, and that neither the captain of the steamboat nor any of the hands on board could have suspected that it was a box of costly merchandise, requiring extraordinary attention and care; the defendant was doubly wronged: first, deprived of his just reward for carrying the goods; and second, prevented from exercising proper precaution against the dangers to which the property may be exposed. (b)

¹ *Bradley v. Waterhouse*, 1 Moody 9 Wend. 85, recognized in *Hawkins v. & M.* 154. And see *Story on Bailm.* Hoffman, 6 Hill, 586.

§ 77.

⁴ *Ante*, § 115.

² *Relf v. Rapp*, 3 Watts & S. 21.

⁵ *Pardee v. Drew*, 25 Wend. 85.

³ *Orange County Bank v. Brown*,

(a) See *Lebeau v. Gen. Steam Nav. Co.* L. R. 8 C. P. 88, cited *ante*, § 231.

(b) In *Richards v. Westcott*, 7 Bosw. 6, an ordinary travelling-trunk was delivered to an expressman to be carried to a passenger depot. The trunk

§ 263. Not unlike in principle from the two cases cited in the preceding section is the case of *Miles v. Cattle*.¹ In this case, the plaintiff, a passenger by the defendant's coach, having received a parcel of value from a friend, to be booked and conveyed by the same coach, instead of doing as directed, he placed it in his own bag, which was subsequently lost; being a wrong-doer towards the defendants, the loss was held to be imputable to his own misfeasance, and he could not sue them for the value.

§ 264. Where there is no notice, if there are no improper means or artifice adopted by the person who sends the goods, to conceal the nature and value of the contents of the box, parcel, or package, to mislead or deceive the carrier, the person sending the goods is not bound to make the disclosure unless inquiry is made of him on the subject; although the carrier has the right to make the inquiry, and to have a true answer, and if a false answer is given, he will not be responsible.² In *Walker v. Jackson*, decided in 1842, in the English Court of Exchequer,³ Baron Parke says: "I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that if any thing is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions; if they are answered improperly, so as to deceive him, then there is no contract between the parties; it is a ground which vitiates the contract altogether."⁴ Mr. Justice Nelson, in

¹ *Miles v. Cattle*, 6 Bing. 743, and cited *ante*, § 41.

² Opinion of Chancellor Walworth, in *Sewall v. Allen*, 6 Wend. 349. *Hollister v. Nowlen*, 19 Wend. 234. *Cole v. Goodwin*, 19 Wend. 251. *Phillips v. Earle*, 8 Pick. 182. 2 Kent, Com. 603, 604. Story on Bailm. § 567. *Brooke v. Pickwick*, 4 Bing. 218. *Sleat v. Fagg*, 5 B. & Ald. 342. *Batson v. Donovan*, 4 B. & Ald. 21.

³ *Walker v. Jackson*, 10 M. & W. 168.

⁴ In this case, it appeared that the plaintiff went on board the defendant's steamboat, with his horse and carriage, paying the defendant's charge of a light four-wheeled phaeton; that jewelry and watches of great value, which much increased its weight, were contained in a box under the seat; and that he made no communication of that fact to the defendant. The car-

contained jewelry. *Held*, the carrier was not liable, even though the owner practised no intentional fraud.

giving the opinion of the court, in *Orange County Bank v. Brown*, in New York,¹ says: "As a general rule, when there has been no qualified acceptance of the goods by special agreement, or where an agreement is not to be inferred from notice, the carrier is bound to make the inquiry as to the value of the box or the article delivered to him; and the owner must answer at his peril; and if such inquiries are not made, and it is received for such price for transportation as is asked, with reference to its bulk, weight, or external appearance, the carrier is responsible for the loss, whatever may be its value."²

§ 265. But it is not competent to the carrier, in an action against him for negligence, to set up as a defence, under a plea of not guilty, that the owner of the goods misrepresented them; the plea operating only as a denial of the loss or damage, and not of the receipt of the goods by the carrier, who ought either to plead the misrepresentation specially, or traverse the acceptance of the goods for the purpose of being carried.³ (a)

§ 266. It is said that it was to obviate the inconvenience of asking questions in every case, and the difficulty of proving the statements made on each occasion, that common carriers in England resorted to the expedient of a general notice, that they would not be liable for the loss of money and valuables unless they were informed of their existence; nor for the loss of ordinary goods and chattels beyond a certain amount, unless the value of such goods was declared and entered at the office, and an increased rate of

riage was taken safely across the river, and on the arrival of the boat at the pier head at Liverpool, two of the defendant's servants put the carriage out upon the slip, towards the quay, but in doing so were overpowered by its weight, and it ran down into the river, whereby the jewelry and watches were much injured: it was *held*, that the plaintiff's right of action for this injury was not affected by his not having communicated the fact of the

jewelry and watches being contained in the carriage.

¹ *Orange County Bank v. Brown*, 9 Wend. 115.

² And see the case referred to, *ante*, §§ 115, 262; and see also *Hawkins v. Hoffman*, 6 Hill, 586. Lord Mansfield, in *Gibbon v. Payntou*, does not deny that mere silence as to the amount may in general be honest. 4 Burr. 2298.

³ *Webb v. Page*, 6 Scott, N. R. 951; 6 Man. & G. 196.

(a) Where an article is delivered to a common carrier for transportation, he must exercise his own judgment as to the mode of carrying it, and cannot escape liability by proving misrepresentations, unless they relate to matters patent in their character. *New Jersey R. v. Pennsylvania R.* 3 Dutch. 100.

remuneration paid for their conveyance.¹ But there has been some question as to whether the carrier is not bound to inquire, although he has given notice.² The case of *Gibbon v. Paynton*,³ was among the earliest, if not the very first, of the cases in which a carrier's notice appears.⁴ The defendants in this case had advertised that their coachman would not be answerable for money or jewels, or other valuable goods, unless he had notice that such were delivered to him; and it was probable that the plaintiff knew of the notice, and understood that by the course of trade, money was not carried without an extra premium. Yet the plaintiff delivered to the coachman £100, hid in hay in an old nail bag. (a) The bag and the hay were carried safely, but the money was lost. It was held, the plaintiff could not recover. Lord Mansfield proceeded entirely independent of the notice; but Yates, J., considered the notice equivalent to a special acceptance, and Aston, J., hinted at the same ground. The judges in the case of *Batson v. Donovan*,⁵ with the exception of Best, C. J., held that the effect of the notice is to prevent the necessity of a particular inquiry in each case; and that, in cases of notices, the party who sends the goods, without payment for the extraordinary value, holds them out impliedly as articles of ordinary value; and under such circumstances the contract itself becomes a nullity.⁶ But Best, C. J., was of opinion that when there is notice the carrier is bound to inquire, and held that the owner of the goods is not bound to disclose their value unless asked; and to this opinion he has steadily adhered,⁷ and so strenuously, that in one case,⁸ he said he must continue to retain his opinion till the twelve judges decided he was wrong.⁹ In *Orange County Bank v. Brown*,¹⁰ the court, by Nelson, J., hold that in case of notice the carrier is not bound to make the inquiry, and that if the

¹ Add. on Cont. 814. *Jordan v. Fall River R.* 5 Cush. 69.

² Story on Bailm. § 568.

³ *Gibbon v. Paynton*, 4 Burr. 2298.

⁴ 9 Geo. 3, Easter Term, 1769.

⁵ *Batson v. Donovan*, 4 B. & Ald. 21.

⁶ See Story on Bailm. § 568.

⁷ *Sleat v. Fagg*, 5 B. & Ald. 342.

⁸ *Brooke v. Pickwick*, 4 Bing. 218.

Butt v. Great Western R. 11 C. B.

140; 7 Eng. L. & Eq. 443.

⁹ See also *Garnett v. Willan*, 5 B.

& Ald. 53; *Riley v. Horne*, 5 Bing.

217; *Bignold v. Waterhouse*, 1 Maule & S. 255.

¹⁰ *Orange County Bank v. Brown*,

9 Wend. 115.

(a) See also *Chicago R. v. Thompson*, 19 Ill. 578; *Richards v. Westcott*, 2 Bosw. 589; *Belfast R. v. Keys*, 9 H. L. Cas. 556.

owner omits to make known the value, and does not therefore pay the premium at the time of the delivery, it is considered as dealing unfairly with the carrier, and he is not liable to the amount mentioned in his notice, or not at all, according to the terms of the notice."¹

§ 267. As the carrier may set up fraud and imposition on the part of the person sending the goods, the latter, although the former is protected by a general notice, may charge and prove negligence in the former; so that, in effect, proof of negligence is an answer to proof of notice.² "If the carrier should perchance refuse to carry the goods unless promise were made unto him that he should not be charged for any misdemeanor that should be in him, the promise were void; for it were against reason, and against good manners."³ It cannot, therefore, be supposed, that the person sending goods, and the carrier who is to convey them, intended to enter into a contract for the letting and hiring of labor and care,⁴ and agreed, at the same time, to dispense with the exercise of such labor and care. "It is impossible," according to Lord Ellenborough, "without outraging common sense, so to construe the notice as to make the carrier say, 'We will receive your goods, but will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious.'"⁵ In *Newborn v. Just*,⁶ it was affirmed by Best, C. J.: "It has been decided over and over again, that notice does not protect a carrier against negligence." A notice, therefore, applies only to the responsibility of the carrier as an insurer, and does not exempt him from the consequences of his own negligence, or from the negligence of his servants and agents. Neither by public notice seen and read by his employer, nor even by

¹ But see *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, 19 Wend. 251; *Sager v. Portsmouth R.* 31 Maine, 228; *Davidson v. Graham*, 2 Ohio State, 131; *Pennsylvania R. v. McCloskey*, 23 Penn. State, 526; *Dorr v. N. Haven Nav. Co.* 4 Sandf. 136.

² See *ante*, § 239 *a et seq.*; 2 Stark. Ev. 291.

³ Doct. & Stud. Dial. 2, c. 49.

Noy's Max: c. 43, 92. Best, C. J., in *Newborn v. Just*, 2 Car. & P. 76.

⁴ See *ante*, § 1.

⁵ *Lyon v. Mells*, 5 East, 438. It is evident that one contracting party cannot impose a condition upon the other, going to the destruction of the thing granted, when, by the well-known rule, the thing granted passes freed from the condition. *Tindal*, C. J., *Lucas v. Goodwin*, 4 Scott, 509.

⁶ *Newborn v. Just*, 2 Car. & P. 76.

special agreement, can the carrier exonerate himself from the consequences of gross neglect.¹(a)

§ 268. What constitutes gross neglect or gross negligence, in these and other cases, and whether there is any real distinction between negligence and gross negligence, as we have already shown, has been a matter of judicial doubt; and that the distinction could not, with precision, be stated.² In *Wyld v. Pickford*,³ Mr. Baron Parke says: "The weight of authority seems to be in favor of the doctrine, that, in order to render a carrier liable after notice, it is not necessary to prove an abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence." Again, "he (the carrier, notwithstanding the notice) undertakes to carry from one place to another, and for some reward in respect of the carriage, and is, therefore, bound to use ordinary care in the custody of the goods." This case has been considered as putting at rest any further question on the subject, it being entirely satisfactory in its reasoning; so that, in cases of notices, the carrier is liable for losses and injuries occasioned not only by gross negligence, but by ordinary negligence.⁴ Therefore, as there has been occasion before to observe, in cases and by means of notices, common carriers descend only to the situation of private carriers for hire.⁵

¹ *Hollister v. Nowlen*, 19 Wend. 234. *Cole v. Goodwin*, 19 Wend. 251. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344. *Riley v. Horne*, 5 Bing. 217. *Wyld v. Pickford*, 8 M. & W. 461. *Hinton v. Dibbin*, 2 Q. B. 646. *Camden R. v. Burke*, 13 Wend. 611. *Swindler v. Hilliard*, 2 Rich. 286. *Boyle v. M'Laughlin*, 4 Harris & J. 291. *Bean v. Green*, 12 Maine, 422. Notice, clearly, would not screen the defendants from loss occasioned by their negligence or want of ordinary care.

Per Hubbard, J., in *Thomas v. Boston & Prov. R.* 10 Met. 480.

² See *ante*, §§ 22, 23 *et seq.*

³ *Wyld v. Pickford*, 8 M. & W. 461.

⁴ Story on Bailm. § 571. See also the opinion of Lord Denman, in *Hinton v. Dibbin*, 2 Q. B. 646.

⁵ *Ante*, § 54 *et seq.*; and see the subject of ordinary negligence treated at large, *ante*, Chap. III. As to what was sufficient negligence to render the owners of the steamboat "*Lexington*" liable, under a special contract, see

(a) *Pennsylvania R. Co. v. McCloskey*, 23 Penn. State, 526. *Powell v. Pennsylvania R.* 32 Penn. State, 414. *Hibler v. McCartney*, 31 Ala. 501. *Smith v. New York Central R.* 29 Barb. 132. *Ashmore v. Penn. Steam Towing Co.* 4 Dutch. 180. *Boswell v. Hudson River R.* 5 Bosw. 699. *Welsh v. Pittsburg R.* 10 Ohio State, 65. *School District v. Boston, Hartford, & Erie R.* 102 Mass. 552. *Illinois Central R. v. Adams*, 42 Ill. 474.

There has also been occasion before to show, that in most cases the question of ordinary negligence is more a question of fact to be determined by a jury, than of law.¹ It may be repeated, that, if the want of fair dealing, by an improper concealment of the nature and value of the goods, has been the cause of negligence in the carrier, of which he would otherwise have not been guilty, the person sending the goods cannot complain of the consequences of his own act.²

§ 269. The carrier will also be liable, although protected by a notice, if the loss has happened in consequence of his misfeasance, the difference between which and negligence has already been explained; and it appeared, that the first is in direct contravention of the carrier's contract, by which its performance is prevented, and that the latter takes place in the course of performing the contract.³ If the carrier takes the goods beyond the place of destination, and they are lost, he is responsible, although otherwise his notice would protect him; because in so doing he has committed a misfeasance.⁴ Of this description of misfeasance is the case of *Ellis v. Turner*.⁵ A vessel belonging to the defendant, and plying from Hull to Gainsborough, took on board some goods of the plaintiff, to be delivered at Stockwith. It went safe as far as Stockwith, and there delivered a part of the cargo, but not the goods in question; and, in proceeding on her voyage, sunk before she arrived at Gainsborough. The defendants had published a notice, protecting themselves from the want of care in the master or crew; but they were, notwithstanding, made accountable for this misfeasance of their servant, the master of the vessel, in not delivering the goods at Stockwith in safety, when he might have done so.

§ 270. In like manner it will be a misfeasance to deliver the goods to the wrong person, as well as it is at the wrong time and place.⁶ If the delivery be by the carrier to the wrong person, although it may have been innocently made by mistake, or by his being imposed upon, he will be liable to the owner of the goods,

the *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344.

¹ *Ante*, § 51, and sections following. See also *post*, § 559.

² *Ante*, § 258 *et seq.*

³ *Ante*, § 12. *Austin v. Manches-*

ter R. 10 C. B. 454; 11 Eng. L. & Eq. 506. *Whitesides v. Thurlkill*,

12 Smedes & M. 599.

⁴ *Story on Bailm.* § 561.

⁵ *Ellis v. Turner*, 8 T. R. 531.

⁶ *Story on Bailm.* § 545 *b.*

for the full value of them, which are thus lost. Such a wrongful delivery is a misfeasance, and indeed a conversion of the property.¹ (a)

§ 271. In like manner, also, if the goods are sent by a different conveyance than that implied in the undertaking, or in a different manner, and they are lost, the carrier will be liable for the misfeasance, although otherwise he would be exonerated from the loss by the terms of a notice. In *Garnett v. Willan*,² such an act of misfeasance annulled the notice. The defendants, Jones & Willan, had accepted a parcel, booked to be sent by their coach from London to Worcester; it was carried, conformably to their contract, a part of the way, and then forwarded on by another coach, in which Jones had no interest, and was ultimately lost. It was held, that the plaintiffs having contracted for the care and attention of both Willan and Jones, had had the care and attention of one only; so that they had not obtained that for which they contracted, by the wrongful acts of the defendants; and this being in direct contravention of their contract, they were made responsible for the whole loss, notwithstanding the notice. Another decision upon this point is that in *Sleat v. Fagg*.³ The defendants, in this case, having published the usual notice, received a parcel of considerable value, and contracted to send it by the mail; no insurance was made thereon, or intimation given of its value; it was sent by another coach and lost. The court held, that if the defendant had forwarded the parcel by the mail, in pursuance of his contract, he would not have been liable for the loss; but as he had acted in direct contravention of it, it was a misfeasance, and against that the notice was no protection.

§ 272. The above case of *Sleat v. Fagg* is so similar in its facts to *Batson v. Donovan*,⁴ and yet so opposite in its decision, that it is proper to compare the two determinations. In each of

¹ *Stephenson v. Hart*, 4 Bing. 476. 53. And see *Glover v. North Staffordshire R.* 16 Q. B. 912; 5 Eng. L. & Eq. 335.
Duff v. Budd, 3 Brod. & B. 177.
Youl v. Harbottle, Peake, 68. *Dev-
 ereux v. Barclay*, 2 B. & Ald. 702. ³ *Sleat v. Fagg*, 5 B. & Ald. 342.
Stephens v. Elwell, 4 Maule & S. 259. ⁴ *Batson v. Donovan*, 4 B. & Ald.
Powell v. Myers, 26 Wend. 591. 21.

² *Garnett v. Willan*, 5 B. & Ald.

(a) See *Crouch v. Great Northern R.* 11 Exch. 742; 34 Eng. L. & Eq. 573, 585.

them the bailment was precisely the same; in each there was proof of the publication of the notices, of the value of the goods, of the concealment of that value, and of their loss. In the last case, the defendant was protected by his notice; in the first-named case he was held responsible for the goods. In the former case, the loss proceeded from the negligence of the defendant; in the latter, from his misfeasance; and, as the concealment of the value, which was the plaintiff's fault, had caused the negligent performance of the contract, he was barred from complaining of that which was the consequence of his own act; but such a concealment could never cause a misfeasance, that is, a non-performance of the contract, and therefore, in that case, he is entitled to maintain his action. The principle on which the decisions in these cases proceeded is perfectly intelligible, so long as misfeasance and negligence are not confounded with each other.¹

§ 273. The carrier commits an act of misfeasance if he disregards public regulations established by law for the navigation of a canal; and consequently damage, sustained by bilging in a lock which was entered by him in contravention of those regulations, must be compensated by him. The damage done by bilging would have been avoided had the carrier's canal-boat been where it ought by the law of the canal to have been.²

§ 274. In like manner and on the same principle a common carrier undertaking to transport by water is not protected by his notice, if he does not employ a vessel reasonably stout, strong and well equipped for the voyage; for the existence of the common notice will not in any respect change this implied duty.³ Neither will it change the implied duty of a common carrier to guard against a defect in the vehicle or machinery used for the transportation; for there is a breach of the implied warranty in such cases, that the vehicle and machinery shall be in good order and condition, and suited to the nature of the business and employment. Indeed, if they are not in such condition, and the carrier might, by exercising proper diligence, have ascertained it, it will amount to negligence.⁴ Still further, it has been held, that if the

¹ See Jones on Carr. 29.

² *Atwood v. Reliance Trans. Co.* 9 Watts, 87.

³ See as to seaworthiness, *ante*,

§ 173; *Story on Bailm.* § 562; *Lyon v. Mells*, 5 East, 428; *Clark v. Richards*, 1 Conn. 54.

⁴ *Story on Bailm.* (edit. 1846)

defect in the vehicle or machinery is unknown to the carrier, and is not discoverable on inspection, and the loss happens without any culpable negligence on the part of the carrier or his agents, and there is a notice that "all baggage is at the risk of the owner," the carrier will, notwithstanding, be liable for any loss occasioned to the baggage by the defect of the vehicle or machinery.¹ But still it seems by an old case that those means would be deemed sufficient, which, without any extraordinary accident, will probably perform the voyage or the journey.² It is the duty of common carriers on Lake Champlain to provide boats which shall be safe and seaworthy for the season of the year at which goods are shipped.³

§ 275. The utmost effect, then, that can be given to a general notice, or special contract, both in England (*a*) and in this country, although as broad and absolute in its terms as it can be, will not discharge a common carrier from liability for negligence, misfeasance, or want of ordinary care, either in the seaworthiness of the vessel, or her proper equipments and furniture; nor is it allowed to exempt the carrier from accountability for losses occasioned by a defect in the vehicle or mode of conveyance used in the transportation.⁴

§ 276. It has been shown that the burden of proof is on the carrier to show a knowledge of his notice in the person sending the goods;⁵ but when that is made fully to appear, the burden of proof is then on the person sending the goods to show negligence, &c., in the carrier; which is contrary to the general rule in cases

§ 571 *a*. Carriers by land must have good vehicles, and well-broke horses. *M'Kinney v. Niel*, 1 McLean, 450.

¹ *Camden R. v. Burke*, 13 Wend. 611. Story on Bailm. § 571 *a*. And see the case of the unknown and undiscoverable defect in a rudder, *ante*, § 171.

² *Aimes v. Stevens*, 1 Stra. 128.

³ *Day v. Ridley*, 16 Vt. 48.

⁴ See the opinion of Nelson, J., in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344.

⁵ *Ante*, § 247.

(*a*) In England, the carrier might, before the Carrier Act of 1854, limit his liability to any extent, and provide by special contract against liability for his own gross negligence or that of his servants. *Carr v. Lancashire R.* 7 Exch. 704. *Austin v. Manchester R.* 10 C. B. 454. *Great Northern R. v. Morville*, 21 Law J. (N. S.) Q. B. 319. *York R. v. Crisp*, 14 C. B. 527. *Hughes v. Great Western R.* 14 C. B. 637. *Slim v. Great Northern R.* 14 C. B. 647. *Chippendale v. Lancashire R.* 21 Law J. (N. S.) Q. B. 22. *Austin v. Manchester R.* 16 Q. B. 600. *Shaw v. York R.* 13 Q. B. 347.

of common carriers, where there is no notice;¹ for, *primâ facie*, the burden of proof is on a common carrier to exempt himself from liability.²

§ 277. The question was presented by the pleadings for decision in *Hinton v. Dibbin*,³ whether, since the passing of the act of 11 Geo. IV. & 1 Wm. IV.,⁴ a carrier is liable for the loss of goods therein specified, by reason of gross negligence; and the decision of the Court of Queen's Bench was, that under the act, if a parcel containing any of the valuable goods enumerated in Sect. 1 be sent to a carrier for conveyance without a declaration of the nature and value of such goods, and without paying, or engaging to pay, an increased charge, according to Sect. 2, the carrier is not liable for their loss, though it happens by the gross negligence of his servants. Lord Chief Justice Denman, who delivered the judgment of the court, said: "By Sect. 8 it is enacted, that nothing in this act shall be deemed to protect such carrier from the felonious acts of any servant in his employ, nor to protect such servant from liability for any loss or injury by his own personal neglect or misconduct. The former branch of the clause is, to say no more, at least consistent with the supposition, that for conduct short of felony the carrier is no longer liable; whereas it is obvious that, before the passing of the act, the carrier would have been liable for acts of the servant not amounting or approaching to felony,—negligence. The latter branch seems to have been introduced *ex abundanti cautela*, merely, seeing that there is nothing in any part of the act to vary the liability of the servant to the master for any misconduct of the former."⁵(a)

¹ *Ante*, § 282. Story on Bailm. § 573. And see *ante*, Chap. III. § 61.

² See Story on Bailm. § 529.

³ *Hinton v. Dibbin*, 2 Q. B. 646.

By the common law, the servants of the carrier are not liable in any way *ex contractu* to the owner of the goods for loss or damage arising from their own personal negligence. *Cavenagh v. Such*, 1 Price, 328. *Williams v. Cranston*, 2 Stark. 82. *Hyde v. Trent Navigation Co.* 5 T. R. 397.

⁴ *Ante*, § 256.

⁵ See the Report of Officers of

Railway Department of Board of Trade in England (1842, p. xix.), which contains the following remarks:—

"The Carriers' Act distinctly provides, that no general notice shall limit the liability of common carriers with regard to objects other than those enumerated in the act, and the proper rule appears to be, that although railway companies may refuse to take charge of passengers' luggage, unless such reasonable regulations as they find necessary are complied with,

(a) *Great Northern R. Co. v. Rimell*, 18 C. B. 575; 37 Eng. L. & Eq. 245.

§ 278. There may be a waiver of notice.¹ Bayley, J., in *Helsby v. Mears*,² entertained no doubt that a common carrier, notwith-

¹ Jeremy on Carr. 48. Story on Bailm. § 572.

² *Helsby v. Mears*, 5 B. & C. 504.

yet, that if they do not take charge of such luggage they incur the ordinary common-law liability of carriers, subject only to the limitation of the Carriers' Act.

"The same principles apply to regulations limiting the company's liability as regards carriages and horses. This is sometimes done by refusing to carry horses or carriages, unless the owner will sign a special agreement, exempting the company from all liability. This is clearly illegal as regards the general liability, railway companies being bound, like other carriers, by the common law, to undertake the carriage of all articles offered to them, unless there is some reasonable ground for refusal, and it is only allowable to the extent of guarding against any extraordinary risk arising from the nature or value of the object, unless a proper insurance is paid. In the case of carriages it is generally admitted that there is no ground for charging any insurance; but in the case of horses, it appears fair that the company should not be responsible for accidents arising from the viciousness or restiveness of the animal, and that they should not be responsible for more than a fair average value, unless the horse has been entered as of extraordinary value, and a reasonable insurance paid."

That a company would not be liable for accidents to horses, arising from the animal's own viciousness, &c., see *ante*, § 214 a.

The report goes on to remark in a subsequent part, p. xx., that "in two instances representations had been made to the department of the Board of Trade, to the effect that railway companies were in the habit of en-

forcing an illegal regulation, requiring parties who sent carriages or horses by the railway, to sign a special agreement exempting the company from all liability for loss, however occasioned. Letters were written to companies pointing out the illegality of such a course, excepting so far as might be necessary to protect themselves against extraordinary risk, arising from the nature or value of the object, and the result was, that the regulation as regarded carriages was entirely withdrawn, and as regarded horses modified in conformity with principles above stated."

In the case of *Shaw v. York R. 13 Q. B. 347*, the declaration in case stated that defendants were proprietors of the Y. and N. M. Railway, and of certain carriages for the conveyance of passengers, cattle, and goods and chattels upon the said railway for hire; that they received nine horses of the plaintiff, to be safely and securely carried in the carriages of the defendants by the railway for hire; and that, therefore, it was the duty of the defendants safely and securely to carry and convey and deliver the horses of the plaintiff; and then averred the loss of one by reason of the insufficiency of one of the carriages. It appeared, that when the horses were received a ticket was given to the plaintiff, stating the amount paid by the plaintiff for the carriage of the horses, and the journey they were to go, and having at the bottom the following memorandum: "N. B. This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or dam-

standing he has limited his responsibility by a notice that he will not be answerable for goods of more than a certain value, may be bound by a special contract made with any individual, which is contrary to the terms of the notice; and in this opinion both Holroyd, J., and Littledale, J., concurred. And it was held in this case that an express agreement to carry a package of extraordinary value for the common hire will be a waiver of the notice, even if made by one partner only, if it be within the scope of his authority.¹ So also if made by the agent or servant of the carrier. If, before sending goods by a carrier, the sender applies at his wharf to know at what price certain goods will be carried, and he is told, by a clerk transacting the business there, a certain sum per cent, and on the faith of this he sends the goods, the carrier cannot charge more, although it be proved that the carrier had previously ordered his clerk to charge all goods according to a printed book of rates, in which a greater sum is set down for goods of the sort in question.² Again, in the case of the Grand Junction Railway Company,³ which has been before referred to,⁴ who published a printed notice, which was affixed over the door of their station, to the effect that all goods received after four o'clock, P. M., would not be forwarded until the next working-day; notwithstanding this notice, inasmuch as the company was in the habit of forwarding goods for the plaintiff delivered at the station after four o'clock, and the company's weigher, on a particular evening, told a servant of the plaintiff who brought goods to the station

age, however caused, occurring to horses or carriages while travelling, or in loading or unloading." It was held that the terms contained in the ticket formed a part of the contract for the carriage of the horses; and that the alleged duty of the defendants safely and securely to carry and convey the horses did not arise upon that contract. But Lord Chief Justice Denman, in giving judgment, said: "It may be that, notwithstanding the terms of the contract, the plaintiff might have alleged that it was the duty of the defendants to have furnished proper and sufficient carriages, and that the loss happened from a breach of that duty; but the

plaintiff has not so declared, but has alleged a duty which does not arise upon the contract, as it appeared in evidence." See *post*, §§ 436-451.

¹ See *ante*, § 69. If the carrier is told what is the value of the goods, and he is directed to charge what he pleases, and he chooses to charge only the ordinary hire, it is a waiver of the notice as to the goods. *Evans v. Soule*, 2 Maule & S. 1. *Wilson v. Freeman*, 3 Camp. 527.

² *Winkfield v. Packington*, 2 Car. & P. 599.

³ *Pickford v. Grand Junction R.* 12 M. & W. 766.

⁴ *Ante*, § 136.

after the hour limited by the notice, that there was then "plenty of time," and the goods were left upon the faith of this assurance; it was held, that there was evidence to go to a jury of a special contract on the part of the railway company to forward the goods (which were perishable) the same evening.

§ 279. It appears at one period to have been thought that the mere receipt of goods whose value was manifestly beyond the sum in the notice, without any extra payment therefor, was a waiver of the notice.¹ But the later doctrine seems to exclude any presumption founded merely upon the knowledge of the fact above stated, and requires some auxiliary circumstance to support it.²

CHAPTER VIII.

OF THE TERMINATION OF THE CARRIER'S RESPONSIBILITY, BY DELIVERY, AND WHAT EXCUSES A NON-DELIVERY.

§ 280. HAVING considered the duty of a common carrier to receive goods for conveyance, and having endeavored to show when, in the sense of the law, they are delivered to him, and that, with the delivery to him, his extraordinary responsibility commences, and having also endeavored to show the extent of that responsibility, as imposed by the common law, and as it may be limited, modified, or varied by special agreement and by general notices, the subject which next claims attention is that of the delivery of goods by the carrier, by which his duties and responsibilities are terminated. It is, therefore, proposed now to consider, 1st, the obligation properly to deliver; and 2dly, what will excuse a non-delivery.

§ 281. First. It has been shown to be an implied engagement on the part of every undertaker of the work of carrying as a common carrier, to proceed without deviation from the usual and

¹ Beck v. Evans, 16 East, 244; 3 Marsh v. Horne, 5 B. & C. 322. See Camp. 267.

² Story on Bailm. § 572, citing

ante, § 231.

ordinary course, to the place of delivery,¹ or the port of destination;² and also to be the duty of the carrier, if the goods he receives for conveyance are directed to a place beyond the place to which he ordinarily professes to carry, to see that they are delivered at the place to which they are directed.³ (a) It has been shown likewise, that if, by the terms of the bill of lading, the carrier has the privilege of re-shipping the goods in the course of transportation, he is bound for their safe delivery at the place of their ultimate destination.⁴ But if a carrier is instructed by his employer to deliver goods on board of another vessel for a continuance of the transportation and the goods are lost on board such other vessel, he is not responsible if he has safely placed them on board such other vessel, as, by so doing, his character, as common carrier, has ceased.⁵ Thus, common carriers who received goods to transport from New York to Troy, and, at the latter place, transferred them pursuant to instructions from the bailor on board a canal-boat bound for the north, and the goods were lost by the upsetting of the boat, it was held that their character, as common carriers, ceased at Troy; and that having taken proper care that the goods were safely put on board the canal-boat they were not responsible for the loss.⁶ (b)

¹ *Ante*, § 164.

² *Ante*, § 175 *et seq.*

³ *Ante*, § 95 *et seq.* *Burritt v. Rench*, 4 McLean, 325. *Smith v. Nashua R.* 7 Fost. 86.

⁴ *Ante*, § 227.

⁵ *Abbott on Shipp.* (5th Am. ed.) 465. *Strong v. Natally*, 4 Bos. & P. 16.

⁶ *Ackley v. Kellogg*, 8 Cow. 223. Where the master of a vessel is di-

rected to transship or deliver on board another vessel, a delivery on board such other vessel is the termination of the duty of a common carrier. The master, at the end of the transit, is only a forwarder. *Van Santvoord v. St. John*, 6 Hill, 158, reversing the decision of the Supreme Court of New York, in 25 Wend. 661, and *ante*, § 95. As to forwarding merchants, see *ante*, § 75.

(a) *Michigan R. v. Day*, 20 Ill. 375. A usage of a port that, in order to constitute a delivery of goods by a carrier by water, a receipt for them must be given to the carrier by the consignee or his agent, is a bad usage. *Reed v. Richardson*, 98 Mass. 216.

(b) *Wright v. Boughton*, 22 Barb. 561. *Hempstead v. New York Central R.* 28 Barb. 485. See also *ante*, § 97. In the case of *The Convoy's Wheat*, 3 Wall. 225, wheat was shipped at Chicago, to be delivered by the terms of the bill of lading "as per margin." On the margin was written: "Acct. Carrington & Preston, Oswego, N. Y., via Welland Railway, from Port Colbourne to Port Dalhousie, thence by sail or steam to Oswego. Freight to

§ 282. The undertaking of a common carrier to transport the goods to a particular destination necessarily includes the duty of delivering them in safety; (a) and his obligation is to deliver safely at all events, excepting the goods be lost by the act of God, or the public enemy. It is not enough that the goods be carried in safety to the place of delivery, but the carrier must, and without any demand upon him, deliver; and he is not entitled to freight until the contract for a complete delivery is performed.¹ Hence it has been held that if a common carrier on a canal uses the tackle or machinery of a third person in hoisting the goods

¹ *Forward v. Pittard*, 1 T. R. 27. *Garside v. Trent Navigation Co.* 4 T. R. 581. *Hyde v. Trent Navigation Co.* 5 T. R. 389. *Harris v. Rand*, 4 N. H. 259, 555. When the responsibility has begun, it continues, until there has been a due delivery by the carrier, or he has discharged himself of the custody of the goods in his character of common carrier. 2 Kent, Com. (6th ed.) 604. *Eagle v. White*, 6 Whart. 505. *Gibson v. Culver*, 17 Wend. 305. *Ludwig v. Meyre*, 5 Watts & S. 435. *Erschine v. Thames*, 6 Missis. 371. *Parker v. Flagg*, 26 Maine, 181. It is no excuse for non-delivery, for the owners of a steamboat, who are common carriers, for the loss of a shipment on board of her by means of collision with another vessel, and without any fault imputable to either; there being no express stipulation of any kind, between the owner of the goods and

the owners of the boat, that they should be exempted from the "perils of the sea." *Plaisted v. Steam Navigation Co.* 27 Maine, 132. And see *Graff v. Bloomer*, 9 Barr, 114. In *Harrell v. Owens*, in North Carolina, 1 Dev. & B. 273, it was held, that where the master of a vessel undertakes to deliver articles on board of his vessel, on freight, at a certain place, he cannot allege ignorance, or any excuse arising from human fault or human weakness, as a defence for violating his engagement; that the true question is not one of actual blame, but of legal obligation. Nothing short of the act of God, or of the public enemy will excuse, in a common carrier, a neglect to deliver. See also *Griffith v. Ingledew*, 6 S. & R. 429; *Farmers' Bank v. Champlain Trans. Co.* 23 Vt. 286; *Woods v. Devin*, 13 Ill. 746; *Logan v. Mathews*, 6 Barr, 417.

Port Colbourne eight and one half cents per bushel." The vessel only went as far as Port Colbourne, and tendered the wheat there to the agent of the Welland Railroad. He refused to receive it until the vessels that had arrived previously had unloaded. There was but one elevator there, and all wheat had to go through it. The master, without notifying the consignees, then went to Buffalo and libelled the wheat for freight and demurrage. Held, that the course of trade required the vessel to wait, and that the master must be held to have made his contract with full knowledge of the course of trade, that he had no right to take the cargo to Buffalo, that he should have telegraphed the consignees from Port Colbourne, and that he was not entitled to his freight.

(a) See *Chicago R. v. Warren*, 16 Ill. 502.

from his boat, and the machinery breaks, and the goods are thereby injured, he is responsible for the damage; for, although the machinery does not belong to him, it is his *pro hac vice*, and so as to render him answerable for its sufficiency.¹ (a) But if the warehouseman has fairly taken the goods into his own custody, the moment he applies his tackle to them, from that moment the carrier's liability is determined.² It appears, therefore, to be of importance to consider what is requisite to constitute a competent delivery, or such a delivery as will determine the transit and dissolve the carrier's liability. This, in a great measure, is left to the jury to determine. In a trial of an action to recover damages for an injury to the plaintiff's gondola, occasioned by the negligence of the defendant to whom it was bailed, in suffering it to be frozen in the ice, where the defence was that it had been delivered up to the plaintiff before any injury to it had taken place; it was held proper to instruct the jury that the testimony of certain witnesses, if believed, would prove that the gondola had been so delivered up to the plaintiff.³

§ 283. The carrier is bound in all cases to make a proper delivery with reasonable expedition, if no particular time be fixed

¹ De Mott v. Laraway, 14 Wend. 225.

² Thomas v. Day, 4 Esp. 462. Where a carrier (a master of a vessel, for example) has once fairly delivered goods to the consignee, his duty is fulfilled, and his responsibility ceases; and this ought to apprise the consignee, that every instant of the time he allows to elapse after such delivery, without objection or complaint, carries a presumption with it in favor of the master, that the goods were safely delivered, or that no blame is to be imputed to him; for it is inconsistent with his duties and obligations, and would be injurious to commerce, that his responsibility should be continued for months and years after such delivery. Therefore where several packages of goods were shipped at London to a merchant in Quebec, where, upon the arrival of the vessel,

and after delivery of the packages, some of the goods were missing from one of the packages; it was held, that, no notice having been given until several months afterwards, the master was not responsible for the deficiency. The court said, that although no decision of the English courts had been adduced upon this question, yet as the general principles of law in all commercial countries, in relation to the duties of masters of trading vessels, are drawn from the same source as the French law which they quoted, have the same objects in view, and are founded in reason and justice, they must consider them as applying strongly to the present case. Swinburne v. Massue, Stuart, Low. Canada, 569; and see Pardessus, No. 730; 2 Boulay Paty, p. 325.

³ Alley v. Blen, 28 Maine, 308.

(a) See *post*, § 330.

upon; for the duty to deliver within a reasonable time is a term ingrafted, by legal implication, upon a promise or duty to carry generally.¹ (a) A receipt given for merchandise at Baltimore,

¹ Story on Bailm. (4th ed.) § 545 a. 261. Ludwig v. Meyre, 5 Watts & Boyle v. M'Laughlin, 4 Harris & J. S. 435. Erskine v. Thames, 6 Missis. 291. Hand v. Baynes, 4 Whart. 371. Wibert v. New York R. 19 204, and cited *ante*, Chap. VI. § 177. Barb. 36. Hughes v. Great West- Parsons v. Hardy, 14 Wend. 215. ern R. 14 C. B. 637; 25 Eng. L. & Eagle v. White, 6 Whart. 505. Hill Eq. 283, 317. Wallace v. Vigus, v. Humphreys, 5 Watts & S. 123. 4 Blackf. 261. Rome R. v. Sullivan, Wooley v. Riddlelien, 6 Scott, N. R. 14 Ga. 277. 206. Wallace v. Vigus, 4 Blackf.

(a) Hales v. London R. 4 Best & S. 66. Robinson v. Great Western R. 35 L. J. (N. S.) C. P. 123. D'Arc v. London R. L. R. 9 C. P. 325. Mann v. Birchard, 40 Vt. 326. Illinois Central R. v. Waters, 41 Ill. 73. McLaren v. Detroit R. 23 Wis. 138. East Tenn. R. v. Nelson, 1 Cold. 272. Nettles v. South Carolina R. 7 Rich. 190. Broadwell v. Butler, 6 McLean, 296. Michigan R. v. Day, 20 Ill. 375. Nudd v. Wells, 11 Wis. 407. Boner v. Merchants' Steamboat Co. 1 Jones, N. C. 211. If the delay is caused by the act of God the carrier is not liable, if he uses all reasonable means to carry the goods to their destination. As where the delay is caused by a freshet sweeping off a railroad bridge. Lipford v. Charlotte R. 7 Rich. 409.

If a railroad is well equipped, and a delay is occasioned by an unusual influx of business beyond the immediate capacity of the road, and goods are transported as expeditiously as possible in the then condition of the road and the business, the railroad is not liable for a delay. Wibert v. New York R. 19 Barb. 36; 2 Kern. 245. Galena R. v. Rae, 18 Ill. 488. Thayer v. Burchard, 99 Mass. 508. Unless the carrier contracts to deliver the goods in a particular time, he is not liable for a delay not caused in any way by his fault. Conger v. Hudson River R. 6 Duer, 375. But if the delay is caused by the fault of the employees of the carrier, the carrier is liable, although he is not personally in fault. Blackstock v. New York R. 1 Bosw. 77; 20 N. Y. 48. In this case the delay was caused by all the engineers refusing to work. In Briddon v. Great Northern R. 4 H. & N. 847, it was *held* that a carrier of goods or cattle is only bound to carry in a reasonable time under ordinary circumstances, and is not bound to use extraordinary efforts, in order to surmount obstructions caused by the act of God; as, a fall of snow. Where the delay was caused by the act of a third party who had, by agreement with the carrier, sanctioned by an act of Parliament, running rights on the carrier's line, it was *held*, that the carrier was not liable. Taylor v. Great Northern R. L. R. 1 C. P. 385. In Peck v. Weeks, 34 Conn. 145, boxes of poultry packed in ice were delivered to a steamboat to be carried to New York. The clerk of the boat signed a receipt for them, which stated their contents. The boat did not start for two days, being detained by a fog. No care was taken of the poultry, and it was spoiled. It might have been sent by railroad to New York, as the defendant had done in similar cases. *Held*, that the carrier was liable. See *ante*,

with a promise to deliver the same to a person in Philadelphia, and to be carried by the Chesapeake and Delaware Canal, it was held, in *Hand v. Baynes*,¹ was an engagement to deliver in a reasonable time; and what would be a reasonable time, the court also held, must be determined, under all the circumstances, with a view to the condition of the canal, the season of the year, the state of the weather, and such other matters as might enter into the question.

§ 284. A declaration in case alleged that the defendants were common carriers, and that the plaintiff delivered to them certain goods to be carried for him from London to Birmingham, and there to be delivered to the plaintiff for reasonable hire or reward; and then averred, that it was the duty of the defendants safely and securely to carry and to deliver the said goods; but although that a reasonable time for carrying and delivering the goods had long since elapsed, yet the defendants, neglecting their duty in that behalf, did not deliver the goods to the plaintiff, but that the goods, by the negligence of the defendants, were wholly lost to the plaintiff. At the trial, it appeared that the parcel in question had been delivered to the defendants in London on the 8th of August, addressed to the plaintiff at Birmingham, where it ought to have arrived on the 10th, but did not arrive until the 3d or 4th of September. It was held, upon this evidence, that the plaintiff was entitled to recover.² Again, the plaintiff sent certain goods by the defendant (carriers) to be delivered in Bedford on a certain day, in order to be ready for the market on Saturday, but did not give notice that they were left for that purpose. On that day the plaintiff's clerk proceeded there, and, owing to the non-delivery till the Monday following, he removed them to another place for sale. The carrier was held liable for the non-delivery of the goods within a reasonable time; and the expenses so incurred, it was also held, might be given by the jury as damages.³ (a)

¹ *Hand v. Baynes*, 4 Whart. 204.

² *Black v. Baxendale*, 1 Exch. 410.

³ *Raphael v. Pickford*, 6 Scott, 11 Exch. 742, 34 Eng. L. & Eq. 573. See also *Crouch v. Great Northern R. N. R.* 478.

§ 201, n., for rule where a delay occurs through the fault of the carrier, and the goods are afterwards damaged by an excepted peril.

(a) This case has been overruled as to the allowance of expenses. *Woodger v. Great Western R. L. R.* 2 C. P. 318.

§ 285. Where an action was brought in which it was alleged that the defendant undertook, for compensation, to convey an account delivered to him from W. to H., and to be safely delivered to one A. R. ; and that the defendant having so long delayed to deliver the same the debt was barred by the statute of limitations, and thus wholly lost ; it was held, that the plaintiff was entitled to recover.¹

§ 286. It is no excuse for an omission to deliver money delivered to a common carrier to be by him delivered to a bank, that he went to the bank and found it shut. Thus, in an action of assumpsit against the defendant as a common carrier, for a breach of his undertaking, in that capacity, to convey a package of money belonging to the plaintiff in Connecticut to Poughkeepsie in the State of New York, and there deliver it to a bank in that village ; and it appeared, that when the defendant arrived at Poughkeepsie, the bank was shut ; that he went twice to the house of the cashier, and not finding him at home, brought back the money, and offered it to the plaintiff, who declined to accept it ; and that the defendant then refused to be further responsible for any loss or accident ; it was held, that in the absence of any special contract (none was proved in the case) these facts did not constitute a legal excuse to the defendant for the non-performance of his undertaking. That the bank was shut when the carrier went there could amount to nothing, unless it further appeared that he went there at a proper time during the ordinary business hours ; and even then, the court could not say, as a matter of law, that this would be a legal excuse. That there may be circumstances which would excuse a carrier from the delivery of a package of money to a bank to which he has undertaken to convey and deliver it, is doubtless true ; it would depend upon the degree of diligence which the carrier used to let the officers of the bank know that he had a package to deliver there.² The proper time for a carrier of specie to deliver it to a bank to which it is consigned, is not limited to banking hours, unless such is the special contract or the implied usage of the place ; and an offer to deliver it at any time during the usual hours of business, reasonable regard being had to its safety and the convenience of the consignee, is as good as one made in banking hours.³

¹ *Favor v. Philbrick*, 5 N. H. 358.

³ *Young v. Smith*, 3 Dana, 91.

² *Merwin v. Butler*, 17 Conn. 138.

§ 287. If in the opinion of the jury it is proved that goods are tendered by the carrier to the consignee late in the day, after the termination of the hours of business, and when the consignee has dismissed his hands, and is thus incapable of receiving and putting away the goods, the tender of delivery is then unreasonable as to time, and the consignee is guilty of no fault or laches in declining to receive them. Therefore, the duty of the carrier, under such circumstances, is to keep the goods still in custody, and he continues to hold them under all his responsibilities as carrier.¹ (a)

§ 288. In *Eagle v. White*, in Pennsylvania,² the defendants, who were common carriers on a railroad from Philadelphia to Columbia, undertook to carry certain boxes of goods belonging to the plaintiff from Philadelphia to Columbia. The cars arrived at the latter place about sundown on a Saturday evening, and by direction of the plaintiff were placed on a sideling, that is, a side track. The plaintiff declined receiving the goods that evening, on the ground that it was too late; whereupon the agent of the defendants left the cars on the sideling, taking with him the keys of the padlocks with which the cars were fastened, and promised to return on Monday morning. The cars remained in this situation until Monday morning, when they were opened by the plaintiff by means of a key which fitted the lock; and on examination it was discovered that one of the boxes had been opened and the contents carried away. It was held, that the defendants

¹ *Hill v. Humphreys*, 5 Watts & S. ² *Eagle v. White*, 6 Whart. 505.
123.

(a) In *Marshall v. American Exp. Co.* 7 Wis. 1, a carrier delivered a package of money to the teller at a bank, at half-past five in the afternoon. He refused to receive it, on the ground that the cashier had gone home, and the vault was locked up. The carrier put it in his own safe, and in the night the money was stolen. Banking hours closed at 4 p.m. Held, that the carrier was not liable. It appeared in evidence that the bank had been accustomed to receive money from the carrier after banking hours.

The consignee is not bound to receive the goods on a stormy day, if the goods would be damaged thereby. The *Grafton*, Olcott, Adm. 43; 1 Blatchf. C. C. 173. Delivery should be made on a business day. *Sleade v. Payne*, 14 La. Ann. 453. In *Goddard v. Bark Tangier*, 23 How. 28, goods were put on the wharf in Boston, and notice given on Fast day; and while on the wharf they were destroyed by fire. Held, that as the evidence did not show that there was a general usage of the port of Boston not to unload vessels on Fast day, and as there was no law of the State making the transaction of business on that day illegal, the master had a right to deliver his cargo.

were liable to the plaintiff for the value of the goods lost. Rogers, J., who gave the opinion of the court, was of opinion that if the tender was wanting in any one of the essential requisites of a proper time, a proper manner, and a proper place, the responsibility as carrier still continues. Although his strict accountability of carrier may cease, said the learned judge, he becomes a bailee, and as such must take ordinary care of the goods. But in this case, said he, neither party supposed the goods were delivered, or that the responsibility had ceased. But from this opinion Huston, J., dissented.

§ 289. But if, by any accident or misfortune, not amounting to the act of God, (a) or the act of the public enemy, the transportation of the goods is obstructed and delayed, the carrier will not be answerable for the delay so occasioned, if he has used a reasonable degree of exertion and diligence in the transportation. A temporary unavoidable obstruction only suspends, and does not avoid the contract.¹ A common carrier on a canal may be prevented by reason of ice from accomplishing, without serious detention, the whole voyage; and in such event he is only bound to deliver at the place to which he undertook to transport the goods, on the canal again becoming navigable.² (b) The freezing of the canal may, indeed, as has already appeared,³ be deemed the act of God; but suppose the canal-boat has been retarded or obstructed in its voyage by reason of any accident or

¹ Hadley v. Clarke, 8 T. R. 259. In respect to the time of the delivery of goods, a common carrier is responsible only for the exertion of due diligence, and he may excuse delay in delivery by accident or misfortune, although not inevitable. It is enough, that he uses proper endeavors to prevent delay. In other words, the principle upon which the extraordi-

nary responsibility of common carriers is founded does not require that that responsibility should be extended to the time occupied in the transportation; the danger of robbery, or collusion and fraud, has no application in such case. Parsons v. Hardy, 14 Wend. 215. (c)

² Parsons v. Hardy, *ub. sup.*

³ *Ante*, § 160.

(a) See *ante*, § 283, n.

(b) In Beckwith v. Frisbie, 32 Vt. 559, where goods were delayed by the freezing of a canal, and it became necessary to take the goods out and store them, it was held, that the owner of the goods was liable to the carrier for money paid out by him for the storage.

(c) Boner v. Merchants' Steamboat Co. 1 Jones, N. C. 211. See cases, *ante*, § 283, n.

misfortune not amounting to an act of God, as by the disordered condition of some lock, in such case the carrier will not be liable for any damage occasioned to the shipper thereby, if the goods finally arrive in safety, unless he has been guilty of negligence.¹

§ 290. The keeper or owner of a public ferry is bound to transport goods across the stream after night, and a failure to do so will, in Alabama, subject him to an action under the statute, without suit upon the bond; but yet, in such actions, the defendant may show the prevalence of high winds rendering it dangerous; or that the application was after the usual bedtime, and that the residence was at some distance from the ferry.²

§ 291. So the carrier will be excused for his delay in delivery, if the consignee is dead or absent, or has refused to receive the goods, though, in those cases, he is not justified in abandoning the goods, as by leaving them unprotected on a wharf; his duty, on the contrary, being to secure them for the owner.³ Although in *Fisk v. Newton*,⁴ the general rule is recognized, that a common carrier is bound seasonably to deliver the goods intrusted to him to carry, personally to the consignee, at the place of delivery, yet it was held, that where goods are safely conveyed to their place of destination, and the consignee is dead, absent, or refuses to receive, or is not known, and cannot after reasonable efforts be found, the carrier may discharge himself from further liability, by placing the goods in store with some responsible third person in that business, at that place, for and on account of the owner; the storehouse-keeper, in such event, becoming the bailee of the owner of the property. In this case, the consignee of butter, sent from Albany to New York by freight barge, was a clerk having no place of business of his own, and whose name was not in the city directory, and who was not known to the carrier, and, after reasonable inquiries by the carrier's agent, could not be found; and it was held, that the carrier discharged himself from further liability, by depositing the property with a storehouse-keeper then in good credit, for the owner, and taking his receipt for the same, according to the usual course of business in that

¹ Story on Bailm. (4th ed.) § 545 a. 39. *Clendaniel v. Tuckerman*, 17 And see *Evans v. Hutton*, 5 Scott, Barb. 184. *Goold v. Chapin*, 10 Barb. N. R. 670. 612.

² *Pate v. Henry*, 5 Stew. & P. 101.

⁴ *Fisk v. Newton*, 1 Denio, 45.

³ *Ostrander v. Brown*, 15 Johns.

trade; though the butter was subsequently sold by the storehouse-keeper, and the proceeds lost to the owner by his failure. (a)

§ 291 a. Where a carrier by water, upon his arrival at the place of delivery, reports himself ready to deliver his cargo, and the consignee is not ready to receive it, and the carrier's vessel, after waiting several days for an opportunity to discharge her cargo, is, while thus waiting, carried away by a freshet, and her cargo lost overboard by the upsetting of the vessel, so that it could not be delivered to the consignee, freight is nevertheless recoverable. For if the owner or consignee neglects to receive the merchandise, the carrier, if practicable, may leave it in store, and so discharge himself from further liability.¹ (b)

¹ *Clendaniel v. Tuckerman*, 17 Barb. 184.

(a) See *The Thames*, 14 Wall. 98; *Kremer v. Southern Exp. Co.* 6 Cold. 356. If the carrier delivers goods to a warehouseman, the nature of the delivery determines whether the warehouseman is to act as the bailee of the carrier or of the owner of the goods. If for the latter, the carrier cannot reclaim them of the warehouseman by tendering him the amount of his charges. *Hamilton v. Nickerson*, 11 Allen, 308. See *Boilvin v. Moore*, 22 Ill. 318. If a carrier agrees with the owner of goods, after their arrival, to keep them a certain time for him, he may, after the expiration of that time, deliver them to a warehouseman; and, if he does so, the latter is not his agent, and he is not liable for the negligence of the warehouseman. *Bickford v. Metropolitan Steamship Co.* 109 Mass. 151. See *Great Northern R. v. Swaffield*, L. R. 9 Ex. 132. In *Steamboat Keystone v. Moies*, 28 Misso. 243, the consignee refused to receive the goods, and the carrier thereupon brought them back to the consignor and claimed freight both ways and charges, under an alleged custom of the Missouri River. The court *held*, that if the carrier, in acting as agent for the owners, pursued such course as men of ordinary prudence would follow, he would be protected, and doubted whether a custom to return all goods to the consignors would be valid. In *Lyons v. Hill*, 46 N. H. 49, goods were sent by a carrier to a purchaser, the latter to pay cash on delivery. On arrival the purchaser took the goods home to examine them, leaving with the carrier the price, on condition that if the goods were not right, they should be returned and the money given back. After examination the purchaser refused to keep them, gave them back to the carrier, and received back his money. The carrier took the goods to the consignor, who refused to receive them. *Held*, that the carrier was not liable to the consignor.

(b) But if a railroad company contracts to deliver the goods to its own agent, it becomes liable as a carrier for their transportation, and as a warehouseman for their subsequent safe keeping and delivery, and if the agent deposits the goods in the warehouse of a third person, who, by mistake, delivers them to a person not authorized to receive them, the railroad company is liable. *Alabama R. v. Kidd*, 35 Ala. 209. See *Hathorn v. Ely*, 28 N. Y. 78.

§ 292. When a ship-owner or master of a ship cannot, without delay, deliver the goods, from their being unlawfully detained by revenue officers, his liability, nevertheless, continues, inasmuch as he has a remedy over against the officers for the illegal detention.¹

§ 293. If a due delivery of goods is interrupted by persons invested with legal authority to prohibit the landing and delivery at the place at which they are destined, such legal authority must be fully disclosed in the defendants' pleading. Thus, to a declaration upon a contract to carry goods from Liverpool to Canton, and there to deliver them (all and every dangers and accidents of the seas and navigation, of whatever nature or kind soever, excepted) to the plaintiff's agents, the defendants pleaded, that they caused the ship to sail to Canton, and that she, with her goods on board, arrived near to the port of Canton; that then and there certain persons, authorized officers of the British government, and then and there exercising the power of her Majesty's government, to wit, one C. Elliott, then being the chief superintendent of the trade of her Majesty's subjects to and from the dominions of the Emperor of China, according to the form of the statute in that case made and provided, and one Smith, then being captain of her said Majesty's ship the "Volage," then being the commanding officer of her said Majesty's naval forces there, did, for divers good and sufficient and lawful causes and reasons, them in that behalf moving, and not for any wrongful, negligent, unlawful, or improper act or behavior of the defendants, their master or mariners, done or committed, forcibly interrupt the said ship, being a British ship, from further proceeding on its said voyage to Canton aforesaid; and did, by virtue of the powers and authorities to them in that behalf committed, and by means of her said Majesty's naval forces then and there being under their command, and by the force and duress thereof, forcibly constrain and compel the said ship, and continually had constrained and compelled the same not to proceed to Canton aforesaid, and thereby prevented, and thenceforth always hitherto had prevented, and still did prevent, the defendants from delivering the goods at Canton. On special demurrer to this plea, it was held bad for not sufficiently disclosing, that Elliott and Smith, as chief superintendent and commander of the naval forces in the Chinese seas respec-

¹ *Gosling v. Higgins*, 1 Camp. 451.

tively, had legal authority, by statute or otherwise, to act in the manner alleged.¹ But this case has been referred to in support of the position, that if an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance is rendered unlawful by the government of the country, the agreement is absolutely dissolved.²

§ 294. But the principles of law in respect to the obligation of a carrier to deliver goods in a reasonable time, depending upon circumstances, though they apply, as in the foregoing cases, to implied contracts, will not apply to an express contract to deliver in a prescribed time. In the latter case no temporary obstruction, or even the absolute impossibility of complying with the engagement, will be a defence to an action for failure in performing the contract.³ There is a distinction founded in reason and authority, which is, that when the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, then the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or delay, by inevitable necessity, because he might have provided against it by his contract.⁴ (a)

¹ *Evans v. Hutton*, 5 Scott, N. R. 670.

² *Abbott on Shipp.* (5th Am. ed.) 704.

³ *Ante*, §§ 37, 59.

⁴ Per Rogers, J., in delivering the opinion of the court in *Hand v. Baynes*, 4 Whart. 214. *Paradine v. Jane*, Aleyn, 27. *Brecknock Canal Nav. v. Pritchard*, 6 T. R. 750. *Hadley v. Clarke*, 8 T. R. 259. There are also authorities on the subject as between insurers and insured. In *Shubrick v. Salmond*, 3 Burr. 1637, Lord Mansfield takes the distinction between implied cove-

nants, by operation of law, and express covenants, that is, that express covenants are treated strictly. See also *De Hahn v. Hartley*, 1 T. R. 343. It has also been ruled, that if a ship, warranted to sail on or before a certain day, be prevented from sailing on that day by an embargo, the warranty is not complied with. *Horne v. Whitmore*, 2 Cowp. 784. *Pawson v. Watson*, 2 Cowp. 785. Notwithstanding any custom to the contrary, if the carrier specially undertakes to deliver, he is chargeable. *Wardell v. Mourillyan*, 2 Esp. 693.

(a) *The Harriman*, 9 Wall. 161. *Knowles v. Dabney*, 105 Mass. 437. Nor is this construction barred by a subsequent covenant, that a certain deduction shall be made from the freight in the event of a delay in the delivery of the goods beyond the period limited. Nor is the carrier excused, where there is an express agreement to deliver in a certain time, by reason of a bill of lad-

§ 295. When the carriage is by land, and in the absence of any established usage, or any special contract to the contrary, the goods must be carried to the residence of the consignee;¹ so that coach proprietors, for example, are not released from responsibility by having the goods left at the coach-office, or at an inn at which the coach usually stops.² If the carrier tenders the goods at the residence of the consignee, and is ready to deliver them on receiving payment of his hire, he has fulfilled his contract as a carrier; and if the hire is not paid, he is not bound to part with the possession of the goods; but he is authorized to take them back to his warehouse, or place of business, and he holds them thenceforward, not as a common carrier,³ (a) but as a private bailee

¹ See 2 Kent, Com. 604.

generally well-known usage. Gibson

² Add. on Cont. 810. Leaving at the stage-office can only be authorized, in the absence of express permission, by long-established and a

v. Culver, 17 Wend. 305.

³ Storr v. Crowley, 1 M'Clel. & Y. 136. 2 Kent, Com. 604.

ing being given which excepts all unavoidable accidents. *Harmony v. Bingham*, 1 Duer, 209. See also *Place v. Union Exp. Co.* 2 Hilton, 19. So where a common carrier contracted to convey, in a reasonable time after delivery, all the tobacco which the other party to the contract might deliver by a certain day, it was held to be no defence that the falling of the river prevented his boat from going, as boats of lighter draught could go. *Collier v. Swinney*, 16 Misso. 484. See also *Higginson v. Weld*, 14 Gray, 465; *Tirrell v. Gage*, 4 Allen, 251; *Wareham Bank v. Burt*, 5 Allen, 113. In *Gage v. Tirrell*, 9 Allen, 299, in a well-considered opinion, the court held that a common carrier did not, by giving a bill of lading which contained only the exception of perils of the seas, thereby make a special contract to deliver subject only to this exception, but that he was excused from delivery if prevented by the act of God or the public enemy.

(a) In *Great Western R. v. Crouch*, 3 H. & N. 183, a parcel was carried from London to Plymouth, and tendered at noon to the agent of the consignee. He refused to receive, alleging that the charge was too high, and was then informed that the parcel would be sent to London. The next morning the parcel was sent to London. Two hours after it was sent a tender of the freight was made at Plymouth and the parcel demanded. The jury found that the parcel was sent back unreasonably soon, that it ought not to have been sent to London, and that the demand and tender were made in a reasonable time after the parcel had been refused. Held, that the carrier was liable for the value of the parcel.

If the master of a vessel acts as the consignee of the shipper at the port of destination, the liability of the owner of the vessel as carrier ceases as soon as the liability of the master as consignee commences. *Labar v. Taber*, 35 Barb. 305.

for hire;¹ or (if he is not to charge warehouse rent) as a gratuitous bailee.²

§ 296. In *Hyde v. Trent and Mersey Navigation Company*,³ the subject was considerably discussed, whether the carrier was bound to deliver to the individual at his house, or whether he discharged himself from liability by delivery to a porter, at the inn in the place of destination. The opinion of Lord Kenyon was, that the carrier was thus discharged, but the three other judges, Buller, Ashhurst, and Grose, were of opinion, that the risk of the carrier continued until a personal delivery at the house or place of deposit of the consignee. It was said by Buller, J.: "According to the argument, from the inconvenience, that carriers are not bound to deliver goods, I think the same argument tends to establish a much greater inconvenience, the necessity of three contracts, in all cases where the goods are sent by a coach or wagon; one with the carrier, another with the innkeeper, and a third with the porter. But, in fact, there is but one contract; there is nothing like any contract, or even communication, between any other person than the owner of the goods and the carrier: the carrier is bound to deliver the goods, and the person who actually delivers them acts as the servant of the carrier. If the innkeeper has some interest in the concern, then he is liable as a carrier. It has been said, too, that the place of a porter is valuable, and the subject of a purchase; but who sells it? Not the person to whom the goods are sent, but the carrier, or the innkeeper, whom I consider as the same person. If the innkeeper has no share in the profits, then he is the servant of the carrier as well as the porter. Therefore, whether there be the innkeeper and the porter, or the porter only, the carrier is liable in all cases where the goods are lost, after they get into the hands of the innkeeper or porter, because they are delivered to those persons with the consent, and as the servants of the carrier. The different proprietors may divide the profits among themselves, in any way they choose; but they cannot, by their own agreement with each other, exonerate themselves from their liability to the owner of the goods. They may fill the two different characters of ware-

¹ As to private bailees for hire, see *ante*, Chap. III.

Chap. II., and *Young v. Smith*, 3 Dana, 91.

² As to gratuitous bailees, see *ante*,

³ *Hyde v. Trent Nav. Co.*, 5 T. R. 389.

housemen and carriers, at different times, but I deny that they can be both warehousemen and carriers at the same instant. If the undertaking was to carry and deliver, then the goods remain in their custody, as carriers, the whole time."¹

§ 297. On more recent occasions, in England, the opinions of other distinguished judges have settled down in favor of the doctrine as above laid down by Mr. Justice Buller, and concurred in by Ashhurst and Grose, JJ.;² and an actual delivery to the proper person is now generally conceded to be the duty of the carrier.³ (a) Cowen, J., in delivering the opinion of the court, in *Gibson v. Culver*,⁴ considers it well settled that *prima facie* the carrier is under obligation to deliver the goods to the consignee personally. In *Eagle v. White*, in Pennsylvania,⁵ the general rule, unless modified by usage or special contract on the subject of delivery of goods by a carrier, is considered to be that in the contract for carriage, the common carrier engages to deliver the goods intrusted to him into the actual custody of the person for whom they are intended, at his residence or place of business; and that, in no other way can he discharge himself of his responsibility as a common carrier, except by proving that he has performed such engagement, or has been excused from the performance of it, or has been released from it by the act of God, &c.⁶ And, indeed, it has been considered to have been repeatedly ruled that delivery at a point or place in close proximity with the place stipulated will not relieve the carrier from his responsibility as such; and that mere propinquity of delivery is no delivery.⁷

¹ And see *Golding v. Manning*, 3 Wils. 429, in which a delivery to a porter was held to be no delivery to the consignee. *Smith v. Nashua R.* 7 Foster, 86.

² *Storr v. Crowley*, *ub. sup.* *Stephenson v. Hart*, 4 Bing. 476. *Garnett v. Willan*, 5 B. & Ald. 53. *Bodenham v. Bennett*, 4 Price, 34. *Duff v. Budd*, 3 Brod. & B. 177. *Birkett v. Willan*, 2 B. & Ald. 356.

³ 2 Kent, Com. 604. Story on Bailm. § 543.

⁴ *Gibson v. Culver*, 17 Wend. 305.

⁵ *Eagle v. White*, 6 Whart. 505.

⁶ See also *Moore v. Sheredine*, 2 Harris & McH. 453. *Chickering v. Fowler*, 4 Pick. 453. *Young v. Smith*, 3 Dana, 92.

⁷ *Graff v. Bloomer*, 9 Barr, 114. And see *DeMott v. Laraway*, 14 Wend. 226; and *ante*, § 282.

(a) *Haslam v. Adams Exp. Co.* 6 Bosw. 235, cited *post*, § 319. *Baldwin v. Am. Exp. Co.* 23 Ill. 197. *Am. Exp. Co. v. Baldwin*, 26 Ill. 504. If the carrier is ignorant that the property carried belongs to the consignor, he is authorized to deliver it to whomsoever the consignee directs. *Sweet v. Barney*, 23 N. Y. 335. See also *London R. v. Bartlett*, 7 H. & N. 400.

§ 298. It is important for the master of a vessel to recollect that his engagement is to deliver the goods to the persons mentioned in the bill of lading or their assigns.¹ Where the owner of a canal-boat gave a receipt for a quantity of nails which he agreed to deliver to W. L., No. 17 Walnut Street, Philadelphia, and on arrival of the boat in Philadelphia the captain delivered the nails at the wharf of the defendants, who were forwarding and commission merchants, with instructions not to deliver them until the freight was paid; the court considered that the delivery on the wharf was no delivery to the owner or the consignee.² (a)

§ 299. To cases where the engagement is to deliver to the persons mentioned in the bill of lading, the before-mentioned case of *Hyde v. Trent and Mersey Navigation Company* is applicable. To the declaration on a contract by the master of a steam-vessel to convey goods from Dublin to London, and to deliver the same at the port of London to the plaintiff or his assigns, a plea that, after the arrival of the vessel at London the defendant caused the goods to be deposited on a wharf, there to remain until they could be delivered to the plaintiff or his assigns, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes; and that before a reasonable time for delivery had elapsed they were destroyed by a fire which broke out by accident, was held ill. The reason stated by Tindal, C. J., was, that it left the matter in uncertainty. At what interval, after the arrival of the vessel, the defendants caused the goods to be landed did not appear; and whether a reasonable time was allowed to elapse after the vessel's arrival in the port of London, in order to give time to the plaintiff to claim and receive his goods from alongside the vessel, the plea was altogether silent. It was quite consistent, said the learned judge, with the allegations in the plea, that the plaintiff demanded the delivery of his goods before they were landed, and that the defendants refused or neg-

¹ Abbott on Shipp. (5th Am. ed.) 463.

² *Humphreys v. Reed*, 6 Whart. 435.

(a) See *The Thames*, 14 Wall. 98; *Newcomb v. Boston & Lowell R.* 115 Mass. 230; *Alderman v. Eastern R.* 115 Mass. 233. If the master has wrongfully omitted to sign bills of lading, and has sailed without learning the names of the consignees, he cannot avail himself of this ignorance as an excuse for not giving notice of the landing of the goods. *The Peytona*, 2 Curtis, C. C. 21.

lected to permit him to receive them. It left, said he, the matter in uncertainty, whether the plaintiff was not compelled against his will to receive his goods from a wharf where there is no allegation that such is the usual practice in the port of delivery; and he thought the principle laid down in the case of *Hyde v. Trent and Mersey Navigation Company* had a close bearing upon and governed the decision of the case before the court.¹ The judgment in this case was affirmed in the Exchequer Chamber,² in which Patteson, J., said, that the defendants were calling upon the court to hold that a delivery of the goods in question at a strange wharf is a delivery according to the contract. And Lord Denman, C. J., said: "The delivery at Fenning's wharf was certainly not a delivery under the bill of lading, unless the usage and practice of the port of London made it so." The judgment in the Exchequer Chamber was also affirmed in the House of Lords, excepting in so far as it related to a question of costs.³ (a)

§ 300. The doctrine appears to be established in this country that, in the absence of a special contract or of well-established usage, the mere landing of goods from a vessel on a wharf is not such a delivery to the consignee as will discharge the carrier. Where goods were put on board the defendant's sloop to be carried from New York to Albany, and on their arrival at Albany were, by the direction of the defendant, put on a wharf there, it was held not to be a delivery to the consignee, even though the

¹ *Gatliffe v. Bourne*, 4 Bing. N. C. 314.

² 1 Scott, N. R. 1.

³ 8 Scott, N. R. 604.

(a) In *Petrocochino v. Bott*, L. R. 9 C. P. 355, goods were shipped at Calcutta under a bill of lading "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of London," unto the plaintiff or his assigns. On the arrival of the vessel at London, she went into the Victoria docks, and notice was given to the consignees that she was ready to unload. The custom of the dock company was proved to be as follows: The goods are taken from the deck of the vessel by the company's servants, and placed on the dock quay, or, if perishable, under sheds, and if the consignee does not claim them within twenty-four hours they are warehoused. If the consignee sends a lighter they are put into it from the quay by the servants of the company. The expenses of landing and putting into the lighter are paid by the ship-owner. In this case the consignee sent a lighter. The jury found that all the packages had been put on the quay, but that one of them had not been put into the lighter. *Held*, that the ship-owner was not liable for the loss of this package.

goods were taken by a cartman who had often carted for the consignee.¹ (a) The responsibility of a common carrier on the Ohio River does not cease, it has been held, by the delivery of goods on the wharf, and notice given to the consignee; but the duty of the carrier is to attend to the actual delivery.² Landing cotton on a wharf in Charleston (S. C.) was held not a delivery, it not being made so by usage.³ In the absence of usage to the contrary, it has been held in Vermont, that a delivery of the goods on the wharf is not necessarily a delivery to the wharfinger.⁴ If a consignee goes on board a vessel and sees a list of the goods which are then in the hold of the vessel, that is not evidence of a delivery; nor is it, if the master soon afterwards puts them on the dock, but not in the presence nor with the knowledge of the consignee.⁵

§ 301. But the *prima facie* obligation of the carrier to make an actual delivery to the consignee personally may be affected by a well-established and generally known custom and usage.⁶ (b)

¹ *Ostrander v. Brown*, 15 Johns. 39. a delivery to a wharfinger is not in general a delivery according to the direction, see *Wardell v. Mourillyan*, 2 Esp. 693.

² *Hemphill v. Chenie*, 6 Watts & S. 62.

³ *Galloway v. Hughes*, 1 Bailey, 553. ⁵ *Ostrander v. Brown*, *ub. sup.*

⁴ *Blin v. Mayo*, 10 Vt. 56. That ⁶ Story on Bailm. § 543. 2 Kent, Com. 604. *Blin v. Mayo*, 10 Vt. 56.

(a) *Rowland v. Miln*, 2 Hilton, 150. *Sleade v. Payne*, 14 La. Ann. 453. See *Morgan v. Dibble*, 29 Texas, 107.

(b) *Huston v. Peters*, 1 Met. Ky. 558. A usage that the master of the vessel may select the wharf is valid. *Dixon v. Dunham*, 14 Ill. 324. In *The Brig Fittler*, U. S. D. C., Mass., 1866, Lowell, J., a suit was brought to recover damages for an alleged refusal of the master to land the libellant's goods at East Boston. The vessel arrived Saturday night. On Sunday the owners sent an order to the master to haul to Union Wharf, which he did early on Monday. Soon after he had made fast and had discharged his tugboat, he received an order from the libellant to haul to East Boston. This he refused to do. The libellant owned the greater part in bulk and value of the cargo, and was to pay the greater part of the freight. There were several other consignments. Evidence of the usage in such cases was taken at great length. The court held, that the delivery must be in accordance with the usage; that, except in some particular trades, the consignees had the right to order the master to go to any wharf they pleased; that if no order was given he could select a wharf; that if there were several consignees, those who had to pay the greater part of the freight might make the selection, but that the notice should be given in due season, and that after the vessel was at the wharf

The doctrine in respect to all commercial usage is, that, to have it take the place of general law, it must be so uniformly acquiesced in by length of time, that the jury will feel themselves constrained to say, that it entered into the minds of the parties, and made a part of the contract.¹ (a) It was agreed in *Hyde v. Trent and Mersey Navigation Company*, that the obligation of a carrier to deliver might be affected by the customs of the trade, though *prima facie* the carrier is bound to a personal delivery.² In *Garside v. the Same Company*, usage and course of business were received to determine whether the defendants, at the time when the goods were burned, held them as common carriers, or mere warehousemen for the plaintiff; the proof was confined to the course of business in the particular line of stages, and the cause was determined in favor of the defendants.³ Lord Tenterden, in treating of the duties of carriers by water, says: "The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the custom of particular places and the usage of particular trades."⁴

§ 302. If a common carrier from A to B receives goods to be carried from A to B, and by the known usage and course of business the goods are to be deposited in the carrier's warehouse at B, the responsibility, as common carriers, is limited to the arrival of the goods at B, when he holds them, not as common carrier, but as a mere warehouseman.⁵ (b) The keeping of

¹ By Lord Ellenborough, C. J., and Grose, J., in *Rushforth v. Hadfield*, 6 East, 519. The doctrine is recognized in *Gibson v. Culver*, 17 Wend. 305. And see *ante*, §§ 229, 230.

Chickering v. Fowler, 4 Pick. 371. *Van Santvoord v. St. John*, 6 Hill, 158. *Cope v. Cordova*, 1 Rawle, 203. ³ *Garside v. Trent. Nav. Co.* 4 T. R. 581.

² *Hyde v. Trent. Nav. Co.* 5 T. R. 389. *Ostrander v. Brown*, 15 Johns. 39. *Gibson v. Culver*, 17 Wend. 305. *Blin v. Mayo*, 10 Vt. 56. *Galloway v. Hughes*, 1 Bailey, 553. *Hemphill v. Chenie*, 6 Watts & S. 62.

⁴ Abbott on Shipp. (5th Am. ed.) 463. *Cox v. O'Riley*, 4 Port. Ind. 368. And see *ante*, § 289.

⁵ *Rowe v. Pickford*, 8 Taunt. 83. *In re Webb*, 8 Taunt. 443. And see *ante*, §§ 75, 131-135.

selected by the master, it was not reasonable to require him to change. The libel was dismissed.

(a) *Alabama R. v. Kidd*, 35 Ala. 209.

(b) *McCarty v. New York R.* 30 Penn. State, 247. *Hilliard v. Wilmington R.* 6 Jones, 343. *New Albany R. v. Campbell*, 12 Ind. 55. If the carrier

the goods in the warehouse in such cases is, as was observed by Buller, J., "not for the convenience of the carrier, but of the owner of the goods; for when the voyage is performed, it is for the interest of the carrier to get rid of them directly."¹ A float in any town or city is not in any proper or legal sense a warehouse.² (a)

§ 303. In the case of *Thomas v. Boston and Providence Railroad Corporation*³, whose terminus was at Boston, the plaintiff, who lived in a town in the neighborhood of the defendants' warehouse in Boston, was not ready to receive all his goods, and agreeably to usage, they were left for his convenience in the warehouse, and not for any benefit to the defendants; but the defendants were charged, as common carriers, with the loss of a roll of leather from the warehouse. At the trial, in the Court of Common Pleas, before Wells, C. J., it was proved or admitted, that four rolls of leather, the property of the plaintiff, were delivered to the defendants at Providence, to be transported to Boston; that they were so transported, and were deposited at the defendants' depot at Boston; that a teamster, employed by the plaintiff, shortly after called at the depot, with a bill of the freight receipted by the defendants, and inquired for the leather; that it was pointed out to him by the defendants' agent, who had charge of the depot; that the teamster then took away two of the rolls,

¹ *Garside v. Trent Nav. Co. ub. sup.*

³ *Thomas v. Boston & Providence R. 10 Met. 472.*

² *Gould v. Chapin, 10 Barb. 612 (b).*
See *ante*, § 95.

agrees to let goods remain on his boat for ninety days after arrival without extra charge, he is liable only as a warehouseman after arrival. *Hathorn v. Ely, 28 N. Y. 78.* The charter of the Michigan Central Railroad Company gives the company the right to charge storage upon all property transported by it which shall have remained at any of its depots more than four days. It then provides for notices to the consignees, and declares "that in all cases the said company shall be responsible for goods on deposit in any of their depots, awaiting delivery, as warehousemen and not as common carriers." This has been held to apply to property which has reached its final destination, and is there awaiting delivery to the owner, and not to property which is to be delivered to another carrier and to be transported by him. *Michigan Central R. v. Hale, 6 Mich. 243.* *Mills v. Michigan Central R. 45 N. Y. 626.* *Railroad Co. v. Manuf. Co. 16 How. 318.*

(a) See *Miller v. Steam Nav. Co. 6 Seld. 431.*

(b) Affirmed, *20 N. Y. 259.*

and soon after called again and inquired for the other two ; that he was directed to look for them ; and that he found only one. The defendants, to show that they were not liable for any loss occurring while the goods were deposited at their depot, offered to prove that they had, prior to this time, posted up notices containing this expression : “ Merchandise, while in the company’s store-houses, is at the risk of the owners thereof ; ” and that these notices had been so long posted up, and so extensively circulated, that the plaintiff must be presumed to have known their contents ; and that the plaintiff, prior to the time of the loss, had frequently employed the defendants to transport goods for him. The judge ruled that the evidence was inadmissible. The jury were instructed “ to ascertain from all the evidence what was the contract between the parties, and if they were satisfied that it was the usage and practice of the defendants, not only to transport goods over the road, but also to deposit them in their warehouses, without charge, until the owner should have a reasonable time to remove them, and that they did provide warehouses or depots for the purpose of so storing the goods, this usage and conduct would be sufficient evidence for the jury to find that it was a part of the contract that the defendants should so store and keep the goods delivered to them for transportation ; and that, if such was the contract, then their liability as common carriers would continue while the goods were stored in the depot ; but that in the present case, if the goods, after having been so stored, were actually delivered to the plaintiff or his agent, or if an arrangement was entered into between the parties, by themselves or their agents, by which the defendants agreed to part with the custody and control over the property, and the plaintiff agreed to assume the custody and control over it, although there was no actual delivery, or if the plaintiff or his agent so improperly conducted himself, either by language or acts, as to lead the defendants or their agents to believe (they acting with proper care and discretion) that the plaintiff had undertaken to assume the control of the property, and had discharged the defendants from any further responsibility, and the defendants, in consequence, ceased to take any further charge or oversight of the property, the responsibility of the defendants would be thereby terminated ; that the burden of proving these facts was upon the defendants.” A verdict was returned for the plaintiff, and the defendants alleged exceptions

to the instructions given to the jury. Hubbard, J., by whom the opinion of the Supreme Court was delivered, after stating the question to be, whether the defendants were liable as common carriers, after the goods were safely stored in their warehouse depot, proceeded to say: "The transportation of goods and the storage of goods are contracts of a different character; and though one person or company may render both services, yet the two contracts are not to be confounded or blended; because the legal liabilities attending the two are different. The proprietors of a railroad transport merchandise over their road, receiving it at one depot or place of deposit, and delivering it at another, agreeably to the direction of the owner or consignor. But from the very nature and peculiar construction of the road, the proprietors cannot deliver merchandise at the warehouse of the owner, when situated off the line of the road, as a common wagoner can do. To make such a delivery, a distinct species of transportation would be required, and would be the subject of a distinct contract. They can deliver it only at the terminus of the road, or at the given depot where goods can be safely unladed and put into a place of safety. After such delivery at a depot, the carriage is completed. But, owing to the great amount of goods transported and belonging to so many different persons, and in consequence of the different hours of arrival, by night as well as by day, it becomes equally convenient and necessary, both for the proprietors of the road and the owners of the goods, that they should be unladed and deposited in a safe place, protected from the weather and from exposure to thieves and pilferers. And where such suitable warehouses are provided, and the goods, which are not called for on their arrival at the places of destination, are unladed and separated from the goods of other persons, and stored safely in such warehouses or depots, the duty of the proprietors as common carriers is, in our judgment, terminated. They have done all they agreed to do; they have received the goods, have transported them safely to the place of delivery, and, the consignee not being present to receive them, have unladed them, and have put them in a safe and proper place for the consignee to take them away; and he can take them at any reasonable time. The liability of common carriers being ended, the proprietors are, by force of law, depositaries of the goods, and are bound to reasonable diligence in the custody of them, and consequently are only

liable to the owners in case of a want of ordinary care. In the case at bar, the goods were transported over the defendants' road, and were safely deposited in their merchandise depot, ready for delivery to the plaintiff, of which he had notice, and were in fact in part taken away by him; the residue, a portion of which was afterwards lost, being left there for his convenience. No agreement was made for the storage of the goods, and no further compensation paid therefor; the sum paid being the freight for carriage, which was payable if the goods had been delivered to the plaintiff immediately on the arrival of the cars, without any storage. Upon these facts, we are of opinion, for the reasons before stated, that the duty of the defendants as common carriers had ceased on their safe deposit of the plaintiff's goods in the merchandise depot; and that they were then responsible only as depositaries without further charge, and consequently, unless guilty of negligence in the want of ordinary care in the custody of the goods, they are not liable to the plaintiff for the alleged loss of a part of the goods." With regard to the notices posted up, and which were relied on by the defendants, that merchandise in their warehouse was at the risk of the owners, the learned judge said: "In the course of the trial, the defendants offered to prove that, prior to the transportation of the plaintiff's leather, they had posted up notices containing this provision, viz., 'merchandise, while in the company's storehouses, is at the risk of the owners thereof;' and that from the length of time they had been posted, and the prior dealings of the plaintiff with them, he must be presumed to have had knowledge of the fact; but the evidence was not admitted. We are not called upon, in this case, to decide as to the legal character of such notices; a subject which has been fully considered in this country as well as in England. See *Hollister v. Nowlen*, 19 Wend. 234, and *Cole v. Goodwin*, 19 Wend. 251, and the long list of English authorities there cited, on page 269. In the view of the law bearing upon this case, viz., that the defendants are not liable as common carriers, the notice, we think, becomes unimportant, as it clearly would not screen the defendants from loss occasioned by their negligence or want of ordinary care; and beyond that they are not chargeable. Other questions which arose upon the trial it is not necessary to notice. For the reasons stated, we think the learned judge erred in his instructions to the jury, that the liability of common carriers con-

tinued to attach to the defendants while the goods were stored in their depot. The verdict must therefore be set aside. Upon the evidence as reported, there appears little ground to charge the defendants with want of ordinary care in the custody of these goods; but that is a question to be settled on the further trial of the case."¹ (a)

¹ *Sage v. Gittner*, 11 Barb. 120. *Bristol v. Rensselaer* R. 9 Barb. 158.

(a) In *Norway Plains Co. v. Boston & Maine* R. 1 Gray, 263, it was held that a railroad was not liable as a common carrier, but only as a warehouseman, after the goods were unladen from the cars and placed in the warehouse, although the consignees had no opportunity to take the goods away before the loss. The rule thus laid down has been considered settled law in numerous cases in Massachusetts. *Sessions v. Western* R. 16 Gray, 132. *Rice v. Boston & Worcester* R. 98 Mass. 312. *Miller v. Mansfield*, 112 Mass. 260. *Stowe v. New York* R. 113 Mass. 521. And, in *Rice v. Hart*, 118 Mass. 201, after a full review of the authorities, it was again affirmed. It has also been followed in *Porter v. Chicago* R. 20 Ill. 407; *New Albany R. v. Campbell*, 12 Ind. 55; *Bansemer v. Toledo* R. 25 Ind. 434; *Francis v. Dubuque* R. 25 Iowa, 60; *Jackson v. Sacramento Valley* R. 23 Cal. 268; *Hilliard v. Wilmington* R. 6 Jones, (N. Car.) 343; *Neal v. Wilmington* R. 8 Jones, (N. Car.) 482. See also *Shepherd v. Bristol* R. L. R. 3 Ex. 189. The rule that there is no change in the nature of the liability of the carrier, until the consignee had had reasonable opportunity to take the goods away, has been adopted in many States, and seems to us more correct. *Moses v. Boston & Maine* R. 32 N. H. 523. *Smith v. Nashua* R. 7 Fost. 86. *Michigan Central R. v. Ward*, 2 Mich. 538. *Blumenthal v. Brainerd*, 38 Vt. 402. *Buckley v. Great Western* R. 18 Mich. 121. *Wood v. Crocker*, 18 Wis. 345. *Parker v. Milwaukee* R. 30 Wis. 689. *Alabama R. v. Kidd*, 35 Ala. 209. *Mobile R. v. Prewitt*, 46 Ala. 63. *Maignan v. New Orleans* R. 24 La Ann. 333. See also *Graves v. Hartford* R. 38 Conn. 143, which, although not strictly in point, the carriage being by water, contains an able discussion of this question. In *McMillan v. Michigan* R. 16 Mich. 79, the court were equally divided upon this question. In *Stevens v. Boston & Maine* R. 1 Gray, 277, the defendants were held liable as warehousemen for negligence in not delivering the goods, when they were ready for delivery and were called for. In *Rice v. Boston & Worcester* R. 98 Mass. 212, the defendants were held liable as carriers for unloading coal in an unsuitable place. "A railroad corporation does not discharge itself of its duty as a carrier by merely bringing goods to the terminus of its road; it is bound also to unload them with due care, and put them in a place where they will be reasonably safe and free from injury. Until this is done, the duty and responsibility which attaches to a corporation as carriers do not close." See *Chicago R. v. Scott*, 42 Ill. 132.

If a special contract is made to deliver goods at a particular place, the carrier is liable until delivery, as a carrier, and not as a warehouseman, although the goods are destroyed in his warehouse. *Moore v. Michigan* R. 3 Mich. 23.

If goods are destroyed by fire after the end of the journey, and while they

§ 304. Therefore, when a common carrier pursues the business both of transportation and warehouse-keeping, the nature and extent of his liability will depend upon the character in which he is accustomed to hold the goods at the time of the loss.¹ If they are received into the warehouse of such carrier to await the future orders of the owner or consignor as to their destination, the carrier is clothed only with the ordinary duties and responsibilities of a warehouseman; his responsibility, as common carrier, having ceased.² (a) If a common carrier between A and B receives goods to be carried from A to B, and thence to be forwarded by a distinct conveyance to C; as soon as he arrives with the goods at B, and deposits them in his warehouse there, his responsibility as carrier ceases; for that is the termination of his duty as such.³ A common carrier, it has been shown, is liable for losses by fire not occasioned by inevitable necessity, as by lightning; whereas a warehouseman is not liable for any losses by fire, unless it be in consequence of ordinary negligence.⁴ But if the destination is marked out, and the carrier has nothing to do but to forward the goods on the earliest opportunity to the place indicated, he is responsible, as common carrier, for any loss or damage that may happen to the goods in the warehouse, as they are then *in transitu*, in contemplation of law.⁵ (b) If the consignee, having no ware-

¹ *Ante*, §§ 75, 131-135. Story on Bailm. § 446.

² *Garside v. Trent Nav. Co.* 4 T. R. 581.

³ *Ante*, §§ 75, 131-135.

⁴ *Ante*, Chap. III.

⁵ *Forward v. Pittard*, 1 T. R. 27. *Goold v. Chapin*, 10 Barb. 612.

are in the possession of the carrier as a warehouseman, the burden is on the carrier to show that the fire was not occasioned by his negligence. *Wardlaw v. South Carolina R.* 11 Rich. 337. In *Milwaukee R. v. Fairchild*, 6 Wis. 403, goods arriving at night were placed on the platform surrounding the warehouse of the company, and were stolen therefrom during the night. The company was held liable. A regulation by a railroad requiring a receipt for all the goods consigned to one person is valid, and the company is not bound to take a receipt for each portion as it is carried away. *Morris R. v. Ayres*, 5 Dutch. 393. See also *Skinner v. Chicago R.* 12 Iowa, 191.

(a) As to what is necessary to change the liability of a carrier into that of a warehouseman, see *Chicago R. v. Warren*, 16 Ill. 502; *Porter v. Chicago R.* 20 Ill. 407; *Michigan Central R. v. Hale*, 6 Mich. 243.

(b) See *ante*, § 131. *Railroad Co. v. Manuf. Co.* 16 Wall. 318. *Wood v. Milwaukee R.* 27 Wis. 541. *Conkey v. Milwaukee R.* 31 Wis. 619. *M'Donald v. Western R.* 34 N. Y. 497. See, however, *Denny v. New York Central R.* 13 Gray, 481, 487, and *Judson v. Western R.* 4 Allen, 520, 523, which seem to be in conflict.

house of his own, asks the carrier to keep the goods until he can conveniently send for them, the carrier's liability, as common carrier, is at an end, and he thenceforth holds them only as a warehouseman for hire, or a gratuitous bailee, according as he may or may not be paid for care and custody of them.¹ A common carrier, therefore, when his responsibility as such is thus changed to that of a warehouseman, is in the same situation as if he had offered to deliver the goods at the residence of the consignee; that is, he has fulfilled his contract as a carrier; and if the hire is not paid, he is not bound to part with the possession of the goods; but he may lawfully take them back to his warehouse or place of business, and he holds them thenceforward, not as a common carrier, but as a bailee for hire; or if by agreement he is not to charge warehouse rent, as a gratuitous bailee.² In all cases of this description the material consideration is, whether the carrier retains the possession of the goods, or is to perform any further duty either by custom or contract, as carrier.³

§ 305. It has been stated and shown to be the duty of the master of a vessel, under his engagement to deliver goods to the persons mentioned in the bill of lading or their assigns, to make an actual delivery to the proper person;⁴ that is, in the absence of any special contract or well-known usage to the contrary.⁵ The defendant, in *Ostrander v. Brown*,⁶ offered to prove that it was customary in the city of Albany for the captains of vessels freighted with goods for merchants in that place, to deliver them by putting them upon the dock, and giving notice to the consignees, who usually had cartmen to carry them to their stores, and that such delivery, with notice, was by custom considered a good delivery. Platt, J., who delivered the opinion of the court, said: "In a case where the precise place of delivery is material, it may be proper to allow evidence of local usage. For instance," says he, "the usage at Havana is often proved to show that some species of cargoes, such as slaves, are to be delivered at the Moro Castle, and that other articles are delivered only on the wharves in the inner harbor."

¹ See *ante*, § 295; *In re Webb*, 8 Taunt. 449.

² *Storr v. Crowley*, 1 M'Clel. & Y. 136. *Young v. Smith*, 3 Dana, 91.

³ See *ante*, § 301; *Gibson v. Culver*, 17 Wend. 305.

⁴ *Ante*, § 298 *et seq.*

⁵ *Ante*, § 301 *et seq.*

⁶ *Ostrander v. Brown*, 15 Johns. 39.

§ 306. In *Chickering v. Fowler*,¹ the action was an action of assumpsit upon the following contract, dated Newburyport: "Received on board brig 'Fanny' 93 barrels of onions, which I promise to deliver to Thomas Haven, of Portsmouth, he paying freight for the same five cents per barrel." Trial was had on the general issue. The brig, of which the defendant was master, it appeared, was going from Newburyport to Portsmouth, for freight to some Southern port, and she had only these onions on board as freight from Newburyport to Portsmouth. The defendant went with the brig to the pier wharf in Portsmouth, where vessels frequently go to deliver goods which they have on freight for persons in Portsmouth, and gave notice to Haven that the onions were there for him. Haven told the defendant that he must deliver them at his (Haven's) wharf, or he would not receive them. The defendant, the master, refused to do this, and a day or two after put the onions on the wharf, where they remained two nights and were frozen and injured. The plaintiff contended that the defendant, both by the custom of Portsmouth, and by the general rules of law, was bound to deliver the onions at the wharf of the consignee, and that he was liable for his gross negligence in not taking reasonable and ordinary care of them. It appeared, that the goods were shipped by the plaintiff by the order of Haven. The court held, that a promise by a master of a vessel to deliver goods to a consignee does not require that he should deliver them to the consignee personally, or at a particular wharf, it being sufficient if he leaves them at some usual place of unloading, giving notice to the consignee that they are so left; and if after such notice the consignee refuses to receive the goods, it is the duty of the master to take care of them for the owner, unless the consignee is under an obligation to receive them, when they will be at his risk; and such facts are for the jury.

§ 307. In case for not delivering, according to the plaintiff's direction, an anchor sent by defendant's hoy, but by him left with the wharfinger (at the quay where the hoy usually discharged her cargo), who had paid the defendant the freight, and gave him a receipt for the goods delivered; although it was proved that by the custom the hoymen never troubled themselves about the goods after their delivery at the wharf (except in cases of flour);

¹ *Chickering v. Fowler*, 4 Pick. N. Y. D. C. 2 N. Y. Legal Ob-
371. *House v. Schooner Lexington*, server, 4.

it was held, "that such custom did not discharge the hoyman from his implied undertaking to deliver the goods according to the direction; and the delivery to the wharfinger was not a delivery according to the direction."¹

§ 308. If the goods, after their arrival, are put on board of a lighter in the customary way, and the owner then takes exclusive custody of them before they are landed, the carrier is discharged from any subsequent loss.² In the river Thames, in England, the liability of the master by custom continues whilst the goods are delivering into a lighter, sent by the consignee to receive them, until the loading is completed.³ In an action of assumpsit against the master of a ship, for not safely conveying and delivering a quantity of tallow to the plaintiffs in London, who were the consignees, the plaintiff had sent a lighter to fetch the tallow from the ship, which had arrived in the Thames. Whilst the lighter was left lashed to the ship, with part of the tallow on board, it was cut from the ship, and part of the tallow stolen thereout; and although the defendant had told the lighterman that he had not hands enough to guard the lighter (to which no answer was returned) it was said by Lord Kenyon: "The custom of the river must undoubtedly govern the parties. There might have been a special contract, limiting the defendant's duty, but he could not do that by any act of his own, without the consent of the other party."⁴ But it has been much contested, says Lord Tenterden, whether the master is by usage bound to take care of the lighter, after it is fully laden, until the time when it can be properly removed from the ship to the wharf;⁵ and at a trial, he says, on this question, it was held, that the master was not obliged to do this.⁶

§ 309. In England, when goods are brought by ships from foreign countries, the bill of lading is merely a special undertaking

¹ *Wardell v. Mourillyan*, 2 Esp. 693. See *Jeremy on Carr.* 19, 65; *Add. on Cont.* 798, 810.

² *Strong v. Natally*, 4 Bos. & P. 16.

³ *Jeremy on Carr.* 66.

⁴ *Catley v. Wintringham*, Peake, 140.

⁵ *Abbott on Shipp.* (5th Am. ed.) 465.

⁶ *Robinson v. Turpin*, cited in

Abbott, sup., as decided at Guildhall Sit. after Trin. Term, 1805, Lord Ellenborough, C. J. This was an action by the owner of the goods against a lighterman, and the plaintiff obtained a verdict. At a former trial before Sir James Mansfield, C. J., the plaintiff had been nonsuited. But see *Strong v. Natally, ub. sup.*

to carry from port to port; and in such case it has been considered that, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the ship-owner.¹ (a) Buller, J., in *Hyde v. Trent and Mersey Navigation Company*,² says: "When goods are brought here from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry from port to port." Ashhurst, J., in the same case says: "The case of foreign goods brought to this country depends on the custom of the trade, of which the persons engaged in it are supposed to be cognizant; by the general custom, the liability of ship-carriers is at an end when the goods are landed at the usual wharf." But this difference in the ingredients necessary to constitute a sufficient delivery by the inland and foreign ship-carrier, seems not to be incidental to their respective characters, but to arise from the nature of their respective contracts; the latter undertaking, by the bill of lading, to convey from port to port, is discharged by a delivery pursuant to the undertaking; the former contracting to deliver to the consignee is bound to the performance of an actual delivery in accordance with his contract; though if he had only engaged to convey generally from one place to another, a delivery at the latter place might discharge him, as that at the port does the ship-carrier; in the case, for instance, where the land-carrier's warehouse is the place of delivery.³

§ 310. In this country, the rule adopted in regard to foreign voyages seems to be that, in such cases, the carrier is not bound to make a personal delivery of the goods to the consignee; but it will be sufficient that he lands them at the usual wharf or proper

¹ Abbott on Shipp. (5th Am. ed.) 463.

² *Hyde v. Trent Nav. Co.* 5 T. R. 389.

³ See *ante*, §§ 302-304.

(a) In *Wilson v. London Steam Nav. Co.* L. R. 1 C. P. 61, the bill of lading provided that, on the ship being ready to unload the whole or any part of the goods (pipes of lemon-juice), the consignee should be ready to receive the same from the ship's side; and in default the master was authorized to enter the goods at the custom-house, and land, warehouse, or place them in lighters at the risk and expense of the consignee. The consignee was not ready to receive the goods until part had been put on the wharf. *Held*, that the ship-owner was bound to deliver the rest of the cargo, unless it would cause him expense and loss of time to change the mode of delivery which had been begun.

place of landing, and gives due and reasonable notice thereof to the consignee.¹

§ 311. In *Cope v. Cordova*, in the Supreme Court of Pennsylvania,² it was held that the master of a vessel arriving at the port of Philadelphia from a foreign port is not bound by the bill of lading to deliver the goods personally to the consignee; and that the liability of the ship-owner ceases when the goods are landed on the usual wharf. Rogers, J., who gave the opinion of the court, said: "In unloading a vessel at the port of Philadelphia, it is usual, as soon as articles of bulk, such as crates, are brought upon deck, to pass them over the side of the ship and land them on the wharf. The owners station a clerk on the wharf, who takes a memorandum of the goods, and the day they are taken away, and this for the information of his employers. A manifest or report of the cargo is made by the master, and deposited at the custom-house, and the collector, on the arrival of the vessel within his district, puts and keeps on board one or more inspectors, whose duty it is to examine the contents of the cargo, and superintend its delivery. And no goods from a foreign port can be unladen or delivered from the ship in the United States, but in open day, between the rising and setting of the sun, except by special license; nor at any time without a permit from the collector, which is granted to the consignee upon payment of duties or securing them to be paid. The holders of a bill of lading are presumed to be well informed of the probable period of the vessel's arrival, and at any rate such arrival is matter of notoriety in all maritime places. The consignee is previously informed of the shipment, as it is usual for one of the bills of lading to be kept by the merchant, a second is transmitted to the consignee by the post or packet, while the third is sent by the master of the ship, together with the goods. With the benefit of all these safeguards, if the consignee uses ordinary diligence, there is as little danger in this country as in England and France of inconvenience or loss; whereas the risk would be greatly increased if it should be the duty of the ship-owner to see to the actual receipt of the goods, and particularly in the case of a general ship with numerous consignments on board, manned altogether by foreigners unacquainted with the language at the port of delivery. I have

¹ Story on Bailm. § 545. ² *Cope v. Cordova*, 1 Rawle, 203. Com. 604.

taken some pains to ascertain the opinion and practice of merchants of the city on this question, which is one of general concern. My inquiries have resulted in this, that the goods, when landed, have heretofore been considered at the risk of the consignee, and that the general understanding has been, that the liability of the ship-owner ceases upon the landing of the goods at the usual wharf. I see no reason to depart from a rule which has received such repeated sanctions, from which no inconvenience has heretofore resulted, and which it is believed in practice has conduced to the general welfare. If the special verdict had found a uniform usage in the one way or the other, we should have held ourselves bound by the custom; for I fully accede to the principle that the mode of delivery is regulated by the practice of the place. The contract is supposed to be made in reference to the usage at the port of delivery. But if no usage had been found, we hold it to be equally clear that we should be governed by the general custom. The case finds that the consignee obtained a permit for the landing of the goods, that they were landed on the wharf, that he was aware the master was employed in discharging his cargo, and that the consignee sent his own porter to receive and take them away; that he inquired for them but did not receive them. If, under such circumstances, the goods were lost, it was in consequence of his own negligence or his servant's. It was the duty of the porter, instead of merely inquiring, to stay till he had actually received the goods. It is beside the question to say that perishable articles may be landed at improper times, to the great damage of the consignee. When such special cases arise they will be decided on their own circumstances. This goes on the ground that the master has acted with good faith, and in the usual manner, and in such case it is the opinion of the court that the ship-owners are discharged." The learned judge concluded by saying that the court would wish to be understood as giving no opinion on the law which regulates the internal or coasting trade, to which he understood the case of *Ostrander*, in New York, to apply; and he did not consider that the opinion of the court interfered with the principles of the case.¹

¹ See *Ostrander v. Brown*, *ante*, that the rule, as to landing goods upon § 300. In *Hemphill v. Chenie*, 6 the wharf, however it might apply to Watts & S. 62, the court considered maritime vessels in foreign trade, did

§ 312. In England, when ships arrive from Turkey, and are obliged to perform quarantine before their entry into the port of London, it is usual for the consignee to send down persons at his own expense, to pack and take care of the goods; and, therefore, where a consignee had omitted to do so, and goods were damaged by being sent loose to shore, it was held that he had no right to call upon the master of the ship for compensation.¹

§ 313. If it is customary for the carrier by water to carry merely from port to port, or from wharf to wharf, and for the owner or consignee to receive the goods at the vessel or at the wharf as soon as the arrival of the vessel is reported, it is of the essence of the rule that such is a good delivery, that due and reasonable notice should be given to the owner or consignee, so as to afford him a fair opportunity of providing suitable means to take care of, and carry off the goods.² (a) Such notice comes in lieu of, and answers for, an actual delivery, where the goods, according to the usual course of business, are to be deposited in any particular place.³ Carriers by ships and boats must stop at the wharf;

not properly apply to transportation on our Western waters, or the internal or the coasting trade. (b)

¹ *Dunnage v. Joliffe*, before Lord Kenyon, C. J., at Guildhall Sit. Mich. Term, 1789, cited in *Abbott on Shipp.* (5th Am. ed.) 465.

² 2 Kent, Com. 604. *Cope v. Cor-*

dova, *ub. sup.* *Wardell v. Mourillyan*, 2 Esp. 693. *Quiggin v. Duff*, 1 M. & W. 174. *Packard v. Getman*, 6 Cow. 757. *Scholes v. Ackerland*, 15 Ill. 474. *Crawford v. Clark*, 15 Ill. 561. See *ante*, § 145.

³ *Gibson v. Culver*, 17 Wend. 305.

(a) *Barclay v. Clyde*, 2 E. D. Smith, 95. See *Hill Manuf. Co. v. Boston & Lowell R.* 104 Mass. 122; *Redmond v. Liverpool Steamboat Co.* 46 N. Y. 578; *Zinn v. New Jersey Steamboat Co.* 49 N. Y. 442; *McAndrew v. Whillock*, 52 N. Y. 50; *Graves v. Hartford Steamboat Co.* 38 Conn. 143. In *Howland v. Greenway*, 22 How. 491, goods were put into the custom-house at the port of destination, and the consignees paid the duties. The master had omitted to include the goods in his manifest, and by the law of the port they were confiscated and sold. The vessel was held liable, on the ground that the delivery contemplated by the contract, viz., a transfer of the property into the power and possession of the consignees, had not taken place. The court said: "The surrender of possession by the master must be attended with no fact to impair the title or affect the peaceful enjoyment of the property. The failure to enter the property on the manifest was a cause of confiscation from the event, and rendered nugatory every effort subsequently to discharge the liability of the ship and owners."

(b) Usage to deliver goods on the wharf must be shown. *Steamboat Sul-tana v. Chapman*, 5 Wis. 454. See *The Eddy*, 5 Wall. 481.

railroad cars must remain on the track, and notice of the arrival and place of deposit, in these cases, comes in lieu of personal delivery.¹ The general rule is recognized in *Fiske v. Newton*, in New York,² to be, that a common carrier is bound to deliver the goods intrusted to him for conveyance, personally to the consignee at the place of delivery, with the qualification that, in certain cases where the transportation is by vessels and boats, notice of the arrival at the place of deposit is sufficient. (a)

§ 314. Goods were forwarded by K., a carrier from London to Liverpool, addressed to the plaintiff (at the Isle of Man), "care of D. (the defendant), Brunswick Street, Liverpool." The goods were landed by K. on a public wharf at Liverpool, and on the same day notice was sent to the defendant of their arrival, and he signed the carrier's book containing an acknowledgment that the goods in question had arrived for him (the defendant). He caused them also to be entered in the clearance and manifest of a steam-vessel about to sail for the Isle of Man. It was proved also, that on former occasions, when goods had been brought by K. for the defendant, he had desired that they might remain at the wharf till he sent for them. The defendant never sent to the wharf for the boxes until six days after their arrival, when they were not to be found. In an action on the case against the defendant for negligence in not taking proper care of the goods, it was held that there was evidence for the jury of a delivery to, and acceptance by, him.³

§ 315. The carrier is, of course, bound to continue his care of the goods until a knowledge of the notice is brought home to the owner or consignee.⁴ It has been held by the Supreme Court of Louisiana, that landing goods by the captain of a vessel on the

¹ *Gibson v. Culver*, 17 Wend. 305.

⁴ 2 Kent, Com. (6th ed.) 604, 605.

² *Fiske v. Newton*, 1 Denio, 45. *Smith v. Nashua R.* 7 Fost. 86. *Price v. Powell*, 3 Comst. 322.

And see *Story on Bailm.* § 545.

³ *Quiggin v. Duff*, 1 M. & W. 173.

(a) *The Thames*, 14 Wall. 98. A public notice that all goods, not taken away by consignees from a railroad depot by twelve o'clock on the day after their arrival, will be sent to a certain warehouse, does not justify a railroad corporation in not giving notice of the arrival of goods, or entitle them to charge consignees with warehouse expenses, until the consignees have neglected within a reasonable time after notice to remove the goods. *Rome R. v. Sullivan*, 14 Ga. 277.

levee at New Orleans, being the usual place of unloading, with notice in the newspapers to the consignees, is not sufficient.¹ (a) In Vermont it has been held that a person undertaking to carry lumber down a river to a certain cove, and being refused a place of deposit there, he left it near by in as proper a place as could be found, from which it was carried away by a flood, and lost, was responsible, because he did not continue his care until he had given notice to the owner, and until the owner had a reasonable time to assume the care over it.² (b)

§ 316. But the carrier may be permitted to prove, that the uniform usage and course of the business in which he is engaged is to leave the goods at his usual stopping-places, in the towns to which they are directed, without notice; and if such usage has been of so long continuance as to justify a jury to find that it was known to the employer, the carrier will be discharged.³ A transportation company on Lake Champlain were intrusted with a package of bank-bills, to carry from Burlington to Plattsburg, which was directed to the cashier of the bank at the latter town, and they delivered the same to the wharfinger at the wharf at the latter town, at which the boat touched, from whom it was stolen. In an action by the consignors against the company for the value of the package, it was held, that it was competent for the company to prove, that it was their uniform usage to deliver such packages of money, when intrusted to them, to the wharfinger having the care of the wharf where the boat landed, without giving any notice to the consignee; and that such usage was well known to the consignors.⁴ In a subsequent case between the same parties, and before the same court, the court say: "Whatever heretofore may have been the views of the court upon this point, a majority are now of opinion that it is not necessary to prove that the plaintiff had personal knowledge of the usage, in order to make it available to the defendants."⁵ They considered

¹ *Kohn v. Packard*, 3 La. 224.

⁴ *Farmers' Bank v. Champlain*

² *Pickett v. Downer*, 4 Vt. 21.

Trans. Co. 16 Vt. 52.

³ *Gibson v. Culver*, 17 Wend. 305.

⁵ 18 Vt. 131.

(a) See also *Segura v. Reed*, 3 La. Ann. 695; *Northern v. Williams*, 6 La. Ann. 578.

(b) The carrier is not liable for not storing the goods at the end of the journey, if he acted in compliance with the directions of the shipper. *Ide v. Sadler*, 18 Barb. 32.

that, upon this point, the case of *Van Santvoord v. St John*¹ had a direct bearing upon the case at bar; and they considered the doctrine of that case to be, that when goods are delivered to a carrier, marked for a particular place, without any directions as to their transportation and delivery, except such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether the consignor knew of the usage or not.

§ 317. As to the delivery of the baggage of passengers from stage-coaches, steamboats, railroad-cars, &c., the subject incidentally received a degree of attention in a former chapter, in treating of the different descriptions of property for the carriage of which persons become responsible as common carriers.² The necessity of delivery of baggage to the passenger, at the end of his journey, by the common carrier, before his responsibility can cease, was there inculcated; but the subject here deserves more particular attention than has before been bestowed upon it.

§ 318. Stage-coach proprietors were held bound, in *Cole v. Goodwin*,³ and in *Powell v. Myers*,⁴ as common carriers, to deliver to each passenger, at the end of his journey, his trunk or baggage; and in the former case it was held, that they could not exonerate themselves from this obligation by a notice that all baggage was "at the risk of the owner."⁵ The defendants, in the former case, were stage-coach proprietors, on a line from Cherry Valley in Ostego County to Manlius in Onondago County, and from thence west. The plaintiff took a seat in one of their

¹ *Van Santvoord v. St. John*, 6 Hill, 157. Whenever a wharf is the usual place of receiving goods by a consignee, it is a sufficient place of delivery. *Sawyer v. Joslin*, 20 Vt. 172. But in Ohio it was held, that a local custom at Memphis regulating the mode of delivering the goods there, is not binding on shippers in Cincinnati, unless known to merchants and shippers there. *Albatross v. Wayne*, 16 Ohio, 513. In Delaware, the usage or custom must have been of standing notoriety, as to warrant a jury to find, that the owner or consignee of the goods had knowledge of it; because

having such knowledge, it is presumed that the usage made part of the contract, and is equivalent to a direction given by the owner or consignee to the carrier to deposit the goods at the stopping-place. *McHenry v. Railroad Co.* 4 Harring. Del. 448, the court citing as authority, *Gibson v. Culver*, 17 Wend. 305.

² See *ante*, §§ 107, 117.

³ *Cole v. Goodwin*, 19 Wend. 251.

⁴ *Powell v. Myers*, 26 Wend. 591.

⁵ See, on the subject of such notices, *ante*, §§ 238-245; *Hollister v. Nowlen*, 19 Wend. 234; and *Cole v. Goodwin*, *ub. sup.*

coaches as a passenger from Cherry Valley to Madison, a town on the line of the route, and paid the usual fare for himself and his baggage, consisting of a trunk containing clothing, \$20 in bank-bills, and a few books. The name of the plaintiff and the place of his destination were marked on a way-bill, but no mention made of his trunk. The trunk was put on board, said the witness (probably in the usual place for carrying baggage). The distance from Cherry Valley to Madison is forty-two miles. The coach arrived at Madison about seven o'clock in the morning, and was driven to the stage-house, the usual stopping-place for breakfasting. The plaintiff left the coach and walked across the street, giving no directions as to his trunk; he returned to the stage-house and took breakfast. There was a change of horses and driver at this place, but no change of the coach. The coach stopped at Madison about an hour. The new driver, when about to start, asked the plaintiff, supposing him to be a passenger, if he was going on, and received an answer in the negative. The coach then drove on. About an hour afterwards the plaintiff inquired for his trunk of the driver who drove the coach to Madison, who answered that he did not know that he had a trunk, and asked him why he had not spoken about it. This driver testified, that when he saw the plaintiff leave the coach and go across the street he supposed he had left, and had no baggage. Eleven months after the loss of the trunk it was found at Auburn and brought back to Hamilton, where it was opened, and all its contents found safe, except that only \$3 in bank-bills were found in the trunk instead of \$20 put in at Cherry Valley. It was proved, that it was an invariable custom, in respect to this line and stage-coaches generally carrying passengers and their baggage, not to take off any of the baggage at the stopping-places where the coaches were not changed, unless at the request of the passengers. Proof of this custom was objected to, but received by the judge. It was also proved, that the defendants had posted up at all the stopping-places of their coaches advertisements in respect to their line of stage-coaches, containing a notice, "all baggage at the risk of the owner;" and that such an advertisement was posted in the stage-house at Cherry Valley, where the plaintiff resided, and it was also proved that the plaintiff had knowledge of such notice. The judge charged the jury that the defendants were bound to deliver the trunk to the plaintiff on the arrival of the coach at

Madison, notwithstanding the usage not to remove trunks and baggage when the coaches were not changed, unless at the request of passengers; inasmuch as there was no proof that the plaintiff had notice of such usage, or of the fact that the coaches were not changed at Madison. Bronson, J.: "The defendants insist that they were only carriers of the trunk to Madison, and were not bound to take it from the coach, or deliver it at that place, without a notice or request from the passenger. In the form in which the objection was taken on the trial, it seemed to be thought important that the trunk was not booked, nor entered in the way-bill; and that it was not labelled or directed to any particular person or place. These are not matters of which the defendants can complain. It was for them, and not for the plaintiff, to determine whether the trunk should be mentioned in their books, or entered on the way-bill; and whether they would carry the trunk without a label or direction was also a matter for their consideration when the contract was made. Having assumed the responsibility of carrying the property, it is not for them to object that they did not adopt all proper precautions to guard against accidents. If the plaintiff on request had neglected or refused to comply with any reasonable regulation of the defendants, it would have presented a different question. But nothing was required of him but the usual fare, and that was paid. In considering whether the defendants are answerable for not delivering the trunk at Madison, it is important to notice that no fraud or intentional concealment is imputed to the plaintiff. Nothing of the kind was pretended on the trial. The plaintiff was a youth, then probably leaving his parents for the first time to enter a public school. Wanting experience as a traveller, and having his thoughts engrossed with other subjects, he forgot his baggage until the coach had departed. This was the whole extent of his error. If the cause turned on the want of diligence, there would perhaps be some difficulty in saying which party ought to bear the loss; though my opinion would, in that view of the case, be against the defendants. They certainly were not without fault. They might have mentioned the trunk as well as the passenger on the way-bill, and thus have advised their coachman and agents that the plaintiff had baggage to be removed at Madison. As this precaution was omitted, it was the duty of the driver, if he did not know how the fact was, to inquire of a passenger leaving

the coach whether he had baggage to be removed. But there was a further and most culpable neglect of duty in not pursuing after the coach when the plaintiff missed his baggage. The coach had been gone but a short time, and at the rate it was travelling might easily have been overtaken. The plaintiff was among strangers, and had no means of pursuing. He applied to Wilbur, the coachman who had driven to Madison, to go after the stage, and was answered that he had no horse. The answer was false, for the horses had been exchanged at that place. Goodwin, the defendants' agent, was absent. The plaintiff applied to his son, but he declined doing any thing. He also applied to the keeper of the stage-house, but with no better success. The defendants select their own servants, and are answerable for their defaults. The coachman was chargeable with gross negligence for not pursuing and recovering the property. He probably thought more of the saving clause in the advertisement, 'all baggage at the risk of the owner,' than he did of the suffering traveller." Cowen, J. : " If the carrier will depend on the care of the owner (and I admit there is often a necessity for it under every responsibility), he certainly may do so ; but it is a solecism to say he is a common carrier, while we deny the very duty which is essential to that character. A mere chalk-mark and the dash of a pen upon the way-bill would in most cases avoid all risk ; and it would be strange, indeed, that the omission of an easy precaution should be deemed by the law equivalent to the act of God. It is really too much like gross negligence. The owner many times cannot reach the baggage-room on account of the crowd ; and if you demand that he should mention or call for it, you require an exertion of body or lungs to which few would be equal under all emergencies. Beside, he may not know whom to address. Are you bound to mark the direction yourself ? The carrier knows the stopping-place, which is perhaps resolved on at the moment, and he holds the way-bill. If the article be not properly directed and entered, let him wait till both be done, or refuse for that reason to undertake what he cannot perform, if there be not time to affix the proper marks. He knows what marks and entries will accord with his system of business, and be intelligible to his agents on the line. All this care belongs in good reason, where the law has placed it, with the carrier himself. The question is one of simple custody, for care follows

custody. This has been held of an innkeeper, whose obligation is much like that of a carrier, and stands upon the same reason. 2 Kent, Com. 591, 3d ed. He is liable for all the goods which his guest brings with him to the inn, even though he hold the key of his chamber where the goods are. Story on Bailm. § 479; 2 Kent, Com. 593, 594, 3d ed. But if he take the exclusive custody of the goods, or positively interfere with them so as to put them in peril, or deliver them to a third person for custody, the innkeeper is exonerated. Story on Bailm. § 483; 2 Kent, Com. 595, 3d ed. 'It appears to me,' said Bayley, J., in *Richmond v. Smith*, 8 Barn. & Cress. 8, 'that an innkeeper's liability very closely resembles that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the king's enemies, although he may be exonerated where the guest chooses to have his goods under his own care.' The analogy was in some measure extended to the carrier by the case of *Miles v. Cattle*, 6 Bing. 743. The plaintiff, a passenger, had with him his own bag of clothes in the coach, into which bag he slipped a £50 bank-note belonging to another, who had directed it to be booked at the carrier's office. It could not have been booked without a reward. The plaintiff thus had it in his exclusive custody, and therefore it was held that he should not recover. In another respect the case was like that before us. At York, his place of destination, he got out of the coach and walked away, and was gone two hours; yet the point was not even made, that he should for that reason fail to recover for his bag and clothes, which had been purloined with the note during his absence. And this, though the case was stronger for a point of gross neglect than the present; for he retained the actual though not the exclusive custody of his bag. In the case before us the regular fare was paid for the plaintiff and his baggage; and the trunk probably placed in the usual separate department." But Nelson, C. J., dissented from the opinion of the other two judges, in so far as they resolved that the proprietors of a stage-coach were responsible for the loss of a trunk, although the passenger, after his arrival at the end of the journey, permitted the coach to proceed on without an inquiry after his trunk, and was silent on the subject for an hour after the coach left.¹

¹ See *ante*, § 114. In *Richards v. London R.* 7 C. B. 839, the declaration stated that the defendants were common carriers for hire on a railway

§ 319. The obligation of the carrier safely to deliver baggage was in the above case of *Cole v. Goodwin* sought to be qualified by usage, and in reference to this ground of defence Bronson, J., said: "The defendants set up a usage in managing their line of stages, to discharge themselves from liability, for the loss of the trunk. The usage proved amounts to this: At Richfield and Bridgewater, where the coaches are changed, the baggage is removed as a matter of course; but at Madison, where the coaches are not changed, they only remove baggage at the request of the passenger. How is the traveller to learn this practice of the defendants, which is different at the two ends of a single stage, except by that kind of experience which the plaintiff has acquired? There is no evidence that he knew any thing about this practice. And, besides, the usage only proves that the defendants have been habitually careless in managing their business. It does not go far enough. They should have established a usage to be exempt from the legal consequences of their negligence." Cowen, J., said of the obligation safely to deliver: "This obligation is sought to be qualified by a usage of the defendants' line, to which the plaintiff is a total stranger. Indeed, in the absence of knowledge of the usage, he is told that the charge of the baggage belonged to himself; and that, by silently departing from the stage at Madison, with apparent unconcern, he improperly lulled the driver into a state of carelessness. It is an answer, that all this was avoidable by a little seasonable caution; and I have yet to learn that when a common carrier is called to account for losses, the passenger is to be answered by his own want of care. It is placing the obliga-

from W. to S.; that the plaintiff's wife was received as a passenger, with her dressing-case and other luggage, to be conveyed from W. to S., and there safely delivered to the plaintiffs for reasonable reward. Breach, that the defendants did not use due care in the conveyance, but that, by their carelessness and negligence, the dressing-case was lost. The evidence was, that the plaintiff's wife was received at W. as a passenger to S., and the dressing-case was placed in the same carriage with herself; that, on arriving at S. she, being in a weak state

of health, was carried to a hackney-coach, and her luggage was removed thither by the defendants' servants, and the dressing-case was never seen after leaving the railway carriage. It was *held*, that the evidence supported the declaration; that the duty of the defendants to deliver was charged, and they had not delivered; and it was also *held*, that it was not necessary to prove negligence, although it was charged. See also *Butcher v. London R.* 16 C. B. 15; 29 Eng. L. & Eq. 347.

tion upon the wrong man. The passenger has surrendered the custody of his baggage to the coach-owners, whose obligation is absolute; and the law will not endure that they should answer either by the utmost care in themselves, or the want of it in another. I speak independent of all usage; for none is brought to the knowledge of the plaintiff. The carrier must take measures at his peril to learn and abide by the place of his delivery, either as fixed by law, or at the utmost by the established and notorious usage of the line; such usage being known to the passenger.” (a)

§ 320. Although the arrival of the baggage at its place of destination in safety will not discharge the carrier until its delivery to the owner, still, unless demanded within a reasonable time, the liability of the carrier, in his strict character of common carrier, will not continue. There may be cases where, at some time after the arrival at the place of destination, the strict responsibility of the common carrier, as such, for baggage remaining in his possession undelivered, without fault or neglect of his own, should cease, and he would then continue to hold them, not as a common carrier (that is, as insuring against all but the act of God, &c.), but as a mere bailee in deposit, gratuitously or otherwise, according to the circumstances.¹

§ 321. Common carriers of passengers and their baggage are liable for the baggage, if delivered upon a forged order, and their innocence in so delivering will not discharge them. In error, from the Supreme Court of New York, Myers brought an action

¹ Powell v. Myers, 26 Wend. 591. circumstances, see *ante*, § 304; Gould As to the liability as depending on v. Chapin, 10 Barb. 612.

(a) In Haslam v. Adams Exp. Co. 6 Bosw. 235, a box was left in the doorway of a building on Broadway, New York, by an express carrier, and notice given by him to a boy in the room of the owner of the box. This room was in the fourth story of the building. *Held*, no delivery, and that a usage to deliver in this way would not be good, unless known to, and acquiesced in, by the owner of the box. In Sullivan v. Thompson, 99 Mass. 259, a usage to deliver goods for an employee of the government bakery at Washington to a clerk in the office, was *held* a reasonable usage in respect to ordinary packages, such as a box of clothing of the value of fifty dollars. But in Packard v. Earle, 113 Mass. 280, it was said that this case was decided upon its peculiar circumstances and facts, and it was *held* that a usage on the part of an expressman to leave packages at a particular railway station, and to substitute a notice of the arrival of the goods there for a personal delivery, is not good, unless known to the consignor at the time of making the contract.

in the Common Pleas against Powell and others, as common carriers, for the loss of a trunk and its contents, taken on board a steamboat owned by the defendants, at West Point, by a son of the plaintiff, who at the time was a minor, and took passage in the boat for New York. The boat usually arrived at New York between nine and ten o'clock in the evening. Shortly before arriving at the dock, a young man named Pruyin (who accompanied the plaintiff's son from West Point), in his presence inquired of the master of the boat whether their baggage would be safe on board the boat during the night; who answered that it would be perfectly safe, for it was under the protection of a watch until morning. Passengers occasionally stayed on board during the night, but usually left the boat on arriving in the city. Pruyin stayed on board, but the plaintiff's son left the boat soon after its arrival, and on the next morning, at about eight o'clock, went to the boat for his trunk, and then learnt that it had been delivered on a forged order. A negro man had come on board and presented an order for the trunk. The master of the boat pointed it out to the negro. Pruyin, who was present, observed that the trunk had been left in his charge. The master of the boat said there was an order for it, when Pruyin said, "Very well," and told the negro to take it. The judge charged the jury that the defendants were responsible for the delivery of the baggage of travellers in their boat, unless lost by inevitable accident; that if the trunk had not been delivered to the passenger, and was not so lost, the defendants remained liable, even after the arrival of the boat at the wharf. To which charge the counsel for the defendants excepted. The jury found a verdict for the plaintiff, on which judgment was rendered; which judgment was affirmed by the Supreme Court, on the ground that this case was not distinguishable from *Cole v. Goodwin*, and *Hollister v. Nowlen*. The defendants removed the record into the Court of Errors, by writ of error, where the judgment of the Supreme Court was affirmed.¹

§ 322. Although it makes no difference as to the responsibility of the carrier that the owner of the baggage goes with it; or that it is accompanied by his servant; yet the carrier is not responsible for a safe delivery if an article of baggage which the owner has kept entirely within his own custody, as for instance, an over-

¹ *Powell v. Myers*, 26 Wend. 591.

coat, not delivered to the carrier, and left by the passenger on a seat in the vehicle.¹

• § 323. A delivery of the goods to a duly authorized agent of the owner or consignee, is of course a sufficient delivery.² (a) But, in an action for non-delivery, if the defence is that a delivery was made to an agent, it must be clearly proved that the person to whom the goods were delivered as agent was duly authorized as such. (b) In *Ostrander v. Brown*,³ the goods were taken away from the wharf where they were landed, without the direction of the consignee, by a cartman usually or always employed to transport his goods; yet this was held not to be evidence of a delivery, as the cartman was not to be deemed the general agent of the consignee for receiving his goods. "Because," said the court, "a merchant usually selects a cartman, and employs him exclusively in carrying goods according to his orders, it by no means follows that such cartman is his general agent for receiving goods without orders." (c)

§ 324. The carrier is under as much obligation to deliver the goods to the right person, as he is to deliver them in a reasonable time and at the proper place. If the delivery be to the wrong person, although it be entirely by mistake, or by gross imposition, the carrier will be responsible for the value of the goods so lost. A wrongful delivery in respect to the person is, indeed, by the common law, treated as a conversion of the property.⁴ (d)

¹ *Ante*, § 113. As to what amounts to a delivery to a carrier, see Chap. V. §§ 140-142. And see further, as to the conveyance of passengers with baggage, and the delivery of the latter, *ante*, §§ 107-117.

² *D'Anjou v. Beayle*, 3 Harris & J. 206. *Lewis v. Western R.* 11 Met. 509. See *ante*, § 146.

³ *Ostrander v. Brown*, 15 Johns. 39.

⁴ Story on Bailm. § 545 b. The

(a) In *Russell v. Livingston*, 16 N. Y. 515, a package of money was sent from New York directed to the plaintiff at Port Gibson, care of A, "express agent, Vienna." A was the agent of the defendant, an express company, at Vienna, and the company did not run an express to Port Gibson. *Held*, overruling *S. C.* 19 Barb. 346, that a delivery to A at Vienna did not terminate the liability of the defendant. See *Sweet v. Barney*, 24 Barb. 533.

(b) *Coombs v. Bristol R.* 3 H. & N. 1. *Adams v. Blankenstein*, 2 Calif. 413.

(c) *Dean v. Vaccaro*, 2 Head, 488. *Hall v. Boston & Worcester R.* 14 Allen, 439.

(d) *Sanquer v. London R.* 16 C. B. 163; 32 Eng. L. & Eq. 338. In *Odell*

Therefore, as has appeared, a delivery of goods by a carrier upon a forged order will not discharge him.¹

§ 325. When the carrier fails in the discovery of the person mentioned as consignee, his duty is to hold the goods in some way

Huntress, Daveis, 83. Warehousemen are not only responsible for losses which arise by their negligence, but also for losses occasioned by the innocent mistake of themselves and of their servants, in making a delivery of the goods to a person not entitled to them. For it is a part of their duty to retain the goods until they are demanded by the true owner; and if, by mistake, they deliver the goods to a wrong person, they will be

responsible for the loss, as upon a wrongful conversion. *Lubbock v. Inglis*, 1 Stark. 104. The Roman law inculcated a like duty, says Story, Bailm. § 450, and illustrated it by the case of a garment delivered to a fuller to dress, which he exchanged by mistake, or delivered to a wrong person, and held him in such a case liable for the loss. Dig. Lib. 19, tit. 2, § 6.

¹ *Powell v. Myers*, 26 Wend. 591. See *ante*, § 321.

v. Boston & Maine R. 109 Mass. 50, the plaintiff bought hay of A to be delivered by the defendant corporation. A took it to the defendant, marked with the plaintiff's name, and gave directions to have it carried to him. By mistake the name of another person was entered on the way-bill; and, after carrying the hay, the defendant inquired of A as to the person to whom it was to be delivered, and was told to deliver it to the other person. A delivery was made accordingly, and it was held that the plaintiff was entitled to recover. In *Dunbar v. Boston & Providence R.* 110 Mass. 26, A sold goods to B, who gave his name as C. The goods were sent by a common carrier addressed to C, and a bill of lading sent by mail to the same address. B obtained the goods of the carrier, without producing the bill of lading, by signing a receipt in his own name. There was no person by the name of C in the place to which the goods were sent. Held, that an action would not lie by A against the carrier. See also *Heugh v. London R. L. R.* 5 Ex. 51; *M'Kean v. M'Ivor*, L. R. 6 Ex. 36; and *ante*, § 298. In *Cork Distilleries Co. v. Great Southern R. L. R.* 7 H. L. 269, the plaintiff in Cork sold a puncheon of whiskey to J. S. in Limerick, and delivered it to the defendant, a carrier, who gave a receipt for it, in which it was stated that it was addressed to Customs warehouse at Limerick for J. S. On arrival at Limerick, J. S. demanded the puncheon, and it was delivered to him. If it had been delivered to the Customs warehouse as addressed, J. S. could not have obtained possession without paying duty. As it was, the plaintiff had to pay the duty. Held, that an action would not lie against the carrier to recover the amount so paid. If a carrier receives goods with instructions not to deliver them without payment of the bill, and he assents thereto, he is liable to the consignor if he delivers them without receiving payment. *American Exp. Co. v. Lesem*, 39 Ill. 312. *Hutchings v. Ladd*, 16 Mich. 493. But it seems that an indorsement on the bill, "Please collect the bill," is a mere request, with which he is not obliged to comply. *Tooker v. Gormer*, 2 Hilton, 71.

for the use of the consignor.¹(a) In *Stephenson v. Hart*,² the plaintiff having been imposed upon by a swindler, consigned a box at Birmingham by the defendants, as common carriers, to J. West, 27 Great Winchester Street, London. The defendants found that no such person resided there; but upon receiving a letter signed J. West, requesting that the box might be forwarded to a public house at St. Albans, they delivered it there to a person calling himself West, who showed that he had a knowledge of the contents of the box; that person having disappeared, and the box having been originally obtained from the plaintiff by fraud, it was held that the defendants were liable to him in an action of trover. The argument which had been raised for the defendants, by the assertion that the box had been delivered to the right person, was answered, said Park, J., by saying that a felon cannot be the right person; and as to the defendant's liability to an action at the suit of West, till it was ascertained that the bill he had given would not be honored, such an action, in the opinion of the learned judge, might have been well defended by showing that the box was tendered at Great Winchester Street, and that no such person was known there. Burrough, J., was clear, that when it was discovered that no such person as the consignee was to be found in Great Winchester Street, that contract was at an end, and the goods remaining in the hands of the carriers as the goods of the consignor, a new implied contract arose between the carriers and the consignor, to take care of the goods for the use of the consignor. The circumstance, said he, that no such person as the consignee was ever heard of at the place to which the goods were addressed, ought to have awakened the suspicions of the defendants, and they were guilty of gross negligence in parting with them without further inquiry.

§ 326. The case of *Duff v. Budd*³ was a harder case than the preceding one of *Stephenson v. Hart*.⁴ There the plaintiffs, having received an order from a stranger to furnish goods for J. Parker of High Street, Oxford, and finding, upon inquiry, that

¹ *Ante*, §§ 291, 295, 304.

⁴ Per Park, J., in *Stephenson v.*

² *Stephenson v. Hart*. 4 Bing. 476. Hart, *ub. sup.*

³ *Duff v. Budd*, 3 Brod. & B. 177.

(a) See *Gilkinson v. Steamboat Scotland*, 14 La. Ann. 417.

Mr. Parker of High Street was a tradesman of respectability, forwarded the goods by a carrier, having directed them to J. Parker, High Street, Oxford. On the arrival of the parcel at Oxford, the carrier's porter there, who knew W. Parker of High Street (and who was accustomed to deliver parcels at the houses of the consignees), told him of the arrival of the parcel, no other Parker residing in that street. W. Parker said he expected no parcel. A person, to whom the porter had before delivered parcels, under the name of Parker, called at the defendant's office shortly afterwards, and saying the parcel was his, was allowed to take it on paying the carriage, there being many persons of that name in Oxford. The plaintiffs, having lost their goods, desired the defendant, by letter, to apprehend the person who had taken them, if he again presented himself, and afterwards said that they would have done with the defendant, if the man who had the parcel were produced. The plaintiffs having sued the carrier, and the judge having directed the jury that the carrier's negligence had been such as to render it unnecessary to consider the question as to the general notice of the carrier limiting his responsibility to a certain amount, and a verdict having been found for the plaintiffs, the court refused to grant a new trial, which was moved for, on the grounds that the question touching the notice ought to have been considered; that the judge ought to have pointed the attention of the jury to the plaintiffs' letter, directing the carrier to apprehend the cheat, and the subsequent conversations thereon; and that the property of the goods had passed out of the plaintiffs. In this case, the language of Richardson, J., is important, who said: "There was clearly a property in the plaintiffs entitling them to sue, as they had been imposed upon by a gross fraud."¹

§ 327. Secondly. As to what will excuse or justify a non-

¹ Trover will lie for the mis-delivery of goods by a warehouseman, although such mis-delivery occurred by mistake only. *Devereux v. Barclay*, 2 B. & Ald. 702; and the case of *Youl v. Harbottle*, Peake, 49, shows that a carrier is liable in trover for a mis-delivery. But there is a great distinction between an omission and an act done. *Ross v. Johnson*, 5 Burr. 2827. A undertook to carry

flour for B to a certain place, and through mistake, deposited by the way a part of the flour, which was taken away by C. B refusing to receive a part only, C took the remainder, and paid A for the whole. This was held to amount to a conversion by A, which would support an action of trover. *Bullard v. Young*, 3 Stew. 46.

delivery of the goods by the carrier. After what has been said in preceding chapters, it is hardly necessary here to say, that it is a sufficient excuse or justification for a common carrier to show that the goods have been lost by the act of God or of the public enemy, and without negligence or malfeasance on his part;¹ that a carrier for hire, who is not a common carrier, will be excused for the same omission, which is in consequence of losses which are not the result of ordinary negligence;² and that a carrier without hire will be excused in case of loss if it has not happened from his gross negligence.³ In respect to common carriers it may also be said that in cases of special limitation of responsibility it is a sufficient excuse for non-delivery that the loss arose by other perils than the act of God, &c., against which he did not insure, and under circumstances which do not subject him to the charge of ordinary negligence.⁴

§ 328. So a non-delivery will be excused where goods have, from actual necessity, been thrown overboard to lighten a vessel and to preserve the lives of the crew and passengers; as in the instances which have already been given;⁵ and also as in the case of the steamer "Missouri," a new and seaworthy boat, which encountered a severe gale on Lake Huron, and after long struggling with the tempest the master and crew thought it necessary to lighten her in order to save her with her freight and passengers.⁶ And so likewise may a carrier show, in justification of non-delivery, that the goods have perished from some inherent defect, and not by any fault of his;⁷ or that the nature and value of the goods were not disclosed to the carrier, and in consequence of which he did not bestow upon them that degree of care and attention which he would have done if not thus improperly kept in ignorance by his employer.⁸

¹ *Ante*, Chap. VI.

² *Ante*, Chap. III. The driver of a stage-coach, having received money to carry, the burden of proof is on him to excuse a non-delivery; and evidence to show that third persons have admitted that another package of money was stolen from the stage on the same day when he received the money in question, is not competent evidence to be submitted to

the jury to prove a loss. *Sheldon v. Robinson*, 7 N. H. 157.

³ *Ante*, Chap. II.

⁴ *Ante*, Chap. VII.

⁵ *Ante*, § 215.

⁶ *Rossiter v. Chester*, 1 Doug. Mich. 154. See also *Halwerson v. Cole*, 1 Speers, 321.

⁷ *Ante*, §§ 210, 211.

⁸ *Ante*, § 258 *et seq.*

§ 329. A carrier by water will be excused for non-delivery if it has been occasioned by the illegal act of the shipper.¹ Goods on board a vessel may be forfeited by the illegal act of the shipper, and if so, and they are seized for the forfeiture, the carrier is discharged from his obligation to deliver. But still, a mere seizure for a supposed forfeiture, and without justifiable cause, will not discharge him ; for if he is a common carrier he is still bound by his undertaking to carry and deliver, as an insurer against all losses but those happening from the act of God and the public enemy.² (a)

§ 330. The carrier will be excused for a non-delivery of the goods at the place of their destination by an agreement or any act of the owner or shipper which discharges the carrier from any further responsibility.³ The goods may, with the consent of the owner or shipper, be delivered over to another carrier, or be deposited at an intermediate place to await future orders.⁴ In an action to recover damages alleged to have been caused by the defendant's negligence in the delivery of a block of marble, it was held that if A, for whom the marble is transported by a railroad company, authorizes B to receive the delivery thereof, and to do all acts incident to the delivery and transportation thereof to A, and B, instead of receiving the marble at the usual place of delivery, requests the agent of the company to permit the car which contains the marble to be hauled to a near depôt of another railroad company, and such agent assents thereto, and assists B in hauling the car to such depot, and B there requests and obtains leave of that company to use its machinery to remove the goods from the car ; then the company that transported the goods is not answerable for the want of care or skill in the persons employed in so removing the marble from the car, nor for the want of strength in the machinery used for the removal of the same, and cannot be charged with any loss that may happen in the course of such delivery to A.⁵ (b)

§ 331. Subsequent directions to the carrier as to the place of

¹ Story on Bailm. § 579.

³ Story on Bailm. § 578.

² Gosling v. Higgins, 1 Camp. 451.

⁴ Ibid.

And see *ante*, § 193.

⁵ Lewis v. Western R. 11 Met. 509.

(a) See Rowland v. Miln, 2 Hilton, 150.

(b) See Loveland v. Burke, 120 Mass. 139.

delivery, will excuse a non-delivery at the place of their original destination. So if the original destination of goods is altered by the plaintiff or his agent, instructing the carrier to take the advice left with a certain person at the original destination, whether they were to go to L. or B., and the carrier finds no advices left for him, and then carries the goods to L., where he stores them, taking a receipt of the receiver, which the carrier duly transmits to the shipper, the carrier is not liable for non-delivery or negligence.¹

§ 332. If the owner or shipper is induced from any cause to accept the goods short of the place to which they were at first intended to be conveyed, the carrier is not only discharged from further liability, but is entitled to a *pro rata* compensation for the transportation as far as it has been continued. In *Parsons v. Hardy*,² the suit was brought to recover the price of transportation of a quantity of merchandise from Albany to Ithaca. The plaintiff proceeded with his load until he arrived at the lock on the canal near Montezuma, which he was prevented from passing in consequence of ice in the canal, and winter setting in, he landed his load and put it in charge of the lock-tender, from whom the defendants received it, and transported it, at their expense, to Ithaca. It was held that although the carrier was responsible for the final delivery of the merchandise in safety, yet the defendants, by accepting the goods at Montezuma, discharged the carrier from further responsibility, and became liable to pay him a *pro rata* compensation for the transportation to that point. So in *Hunt v. Haskell*,³ where a common carrier by sea engaged to deliver goods at a place named, for a stipulated sum as freight, and the owner received his goods before they arrived at the place appointed in the bill of lading, it was held that the carrier was excused from delivery at the place first intended, and is entitled to a *pro rata* freight. In *Lorent v. Kentring*,⁴ it was held that the owner of the goods on freight may authorize their delivery at an intermediate port; or if supervenient causes render the landing of the goods at such port necessary, and he accepts them there, the carrier is discharged, and is entitled to freight *pro rata*. The owner of goods was held, by the Supreme Court of Michi-

¹ *Boyle v. M'Laughlin*, 4 Harris & J. 291.

² *Hunt v. Haskell*, 24 Maine, 339.

³ *Lorent v. Kentring*, 1 Nott &

⁴ *Parsons v. Hardy*, 14 Wend. 215. McC. 132.

gan, to have voluntarily accepted them at an intermediate port, when, knowing that the voyage had been abandoned (its further prosecution having become impossible, or extremely hazardous), he there demanded his goods from the agents of the forwarders with whom they were stored, tendering payment of their charges for storage.¹

§ 333. But the acceptance of the goods at a place short of the place of delivery at first intended, taken in the abstract, will not discharge the carrier. To have that effect the goods must be accepted, or, in other words, taken out of the custody of the carrier, before any cause of action has arisen, by reason of any negligence imputable to the carrier. Nothing, in fact, is better settled than that, after an injury has been committed, the cause of action cannot be discharged by any act short of a release, or acceptance of something in satisfaction.² (a)

¹ *Rossiter v. Chester*, 1 Doug. Mich. 154.

² *Bowman v. Teall*, 23 Wend. 306. This was an action on the case, brought against the defendants, as common carriers, in the transportation of one thousand bushels of salt, which they had undertaken to carry from New York to Albany. The salt was received by the defendants at New York, on board of a lake boat, which was towed by a steamboat as far as Red Hook, when she was cast off by the steamboat in consequence of the obstruction of ice in the river. The lake boat was, however, worked up as far as Catskill, and there left by the master in charge of a person employed by him. The plaintiff and one of the defendants were at Catskill on Friday, and saw the salt. The plaintiff on that occasion told one B., a resident of Catskill, that he and

Teall were going to Hudson to sell the salt, and that if he (B.) did not hear from him before the following Monday, to take the salt and store it. The boat sprung a leak on Saturday night, when B. took out the salt and stored it. Subsequently he removed it to another place, where, during the winter, it was overflowed by a freshet, and the principal part of it melted. There was evidence tending to show negligence in starting the salt from New York, and afterwards in not getting the boat up from Catskill. The judge was requested to charge, that if the jury believed the plaintiff received the salt, or exercised any dominion over it, or gave any direction at Catskill concerning it, this defeated the action; and that, if they believed B. directed the salt to be stored, that would have the effect to defeat the plaintiff. Both requests

(a) This principle appears to have been entirely overlooked in the case of *The Mohawk*, 8 Wall. 152. On the facts stated it would no doubt follow that an action would not lie for the non-delivery of the goods at the port of destination, but it is difficult to see how they justify a finding that the owner released to the carrier the right of action which had already accrued for the damage done to the cargo.

§ 334. If the owner of the goods merely accompanies them in their transit, it will not excuse a non-delivery unless he has the exclusive custody of them.¹ And, although interference by the owner by giving directions, may, under circumstances, be evidence of an acceptance, it is never an acceptance of itself.²

§ 335. If the goods are by the real owner taken from the possession of the carrier, will it afford an excuse for non-delivery to the bailor?³ In general, the carrier is not permitted to dispute the title of the person who delivers the goods to him, and such is clearly the rule when an adverse claim is not asserted by the real owner, but is merely asserted by the carrier of his own mere motion.⁴ It was formerly considered that if an adverse title was asserted by a superior claimant, and the carrier had due notice of it, and was forbidden to deliver to the bailor, he might protect himself from responsibility, and set up such title against the bailor. Thus it was held in *Ogle v. Atkinson*,⁵ that a warehouseman receiving goods from a consignee who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them if they are the property of another, and the latter prohibits the redelivery. But this doctrine seems now to be untenable,⁶ and it is said that, in general, an agent has no right to set up an adverse title against that of his principal, and that the bailee is bound to deliver the goods back to the person by whom

were held by Cowen, J., who gave the opinion of the court, to be founded on principles entirely false. If the judge, said he, charged as he was desired to do, the jury might have been entirely cut off from the consideration of two important questions: one, whether the defendants had been guilty of negligence in not transporting the salt to Albany; and the other, as to negligence in their manner of causing it to be stored for the winter. The carrier, he said, was bound to exercise ordinary forecast in anticipating the obstruction; to exert the proper means for overcoming it; and to exercise due diligence in accomplishing the transportation; and must not, in the mean time, be guilty of negligence in taking care of the property detained. But that none of these

matters, in the form proposed, would have been admissible, even in mitigation of damages.

¹ *Robinson v. Dunmore*, 2 Bos. & P. 419. And see *ante*, §§ 113, 322.

² *Bowman v. Teall*, *ub. sup.* The general principle was adopted in *Todd v. Figby*, 7 Watts, 542, that if injury happen to property in the hands of a bailee, the interference of the bailor to remedy the evil will not release the bailee from liability for the consequence of his negligence.

³ See *Shelby v. Scotchford*, Yelv. 23; *Wilson v. Anderton*, 1 B. & Ad. 450; *King v. Richards*, 6 Whart. 418.

⁴ See *Story on Agency*, § 217; *Story on Bailm.* § 582; *King v. Richards*, *ub. sup.*

⁵ *Ogle v. Atkinson*, 5 Taunt. 759.

⁶ *Story on Bailm.* §§ 450, 582.

he has been intrusted with the custody of them.¹ (a) The carrier may, therefore, be placed in a situation in which he cannot safely deliver the goods to either party. For where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and if the adverse title is well founded, and he resists it, he is liable to an action for the recovery of the goods by the person setting up such adverse title.² But the situation of the bailee is not one without remedy. He is not bound to ascertain who has the right, and he may file a bill of interpleader in a court of equity. If the bailee forbears to adopt that mode of proceeding, and makes himself a party by retaining the goods for the bailor, he must stand or fall by his title.³

§ 336. An exception, however, is allowed where the principal has obtained the goods fraudulently or tortiously from a third

¹ Story on Agency, § 217. Gosling 562. Wilson v. Anderton, 1 B. & v. Birney, 7 Bing. 339. Kieran v. Ad. 450. 2 Story, Eq. Juris. §§ 814–Sanders, 6 A. & E. 516. Holl v. 816.

Griffin, 10 Bing. 246.

² Per Lord Tenterden, C. J., in

³ Story on Bailm. §§ 450, 582. Wilson v. Anderton, *ub. sup.* Com. Taylor v. Plummer, 3 Maule & S. Dig. Chancery, 3 T.

(a) This question is discussed at length in *Sheridan v. New Quay Co.* 4 C. B. (N. S.) 618, and it is *held* that the carrier has the right to say that the goods do not belong to the plaintiff. See *Biddle v. Bond*, 6 B. & S. 225. In *Edwards v. White Line Transit Co.* 104 Mass. 159, it was *held* to be no defence against a common carrier for breach of his contract to deliver goods, that they were taken from him by an officer under an attachment against a person who was not their owner. But in such a case trover will not lie. *Stiles v. Davis*, 1 Black, 101. If goods exempt from attachment are taken from a carrier by an officer, who attaches them as the property of the owner, it is no defence to an action against the carrier by the owner for failure to deliver the goods, that they were taken from him against his will, and without fraud or collusion on his part, or that he was ignorant of the nature of the goods, and supposed the attachment to be valid. *Kiff v. Old Colony R.* 117 Mass. 591.

In *The Mary Ann Guest*, Olcott, 498, 1 Blatchf. C. C. 358, it was *held* to be no defence to an action, by a *bonâ fide* indorsee of a bill of lading for a valuable consideration, against a carrier, that the goods had been taken from his possession on a writ of replevin against the consignor. In *Wells v. Maine Steamship Co.* U. S. D. C. Maine, 1873, it was *held* to be a good defence to an action against the carrier for non-delivery of intoxicating liquors, that they had been taken from his possession by process of law on a complaint against the goods under the liquor law.

person.¹ In *Hardman v. Willcock*,² the defendant was employed to sell, as an auctioneer, certain goods then in the plaintiff's possession. Before the sale a notice was given to the defendant by the assignees of an insolvent, that the goods were their property as such assignees, and that they had been fraudulently removed by collusion between the plaintiff and the insolvent. At the trial the jury affirmed the right of the assignees, and upon the state of facts as found by the jury, they were directed by Patteson J., to find a verdict for the defendant, with liberty to the plaintiff to move to enter a verdict for the amount of the sale in case the court should be of opinion that it was not competent for the defendant, in the peculiar situation in which he stood to the plaintiff, to set up the right of the assignees. It was accordingly moved to enter a verdict for the plaintiff, on the ground that an agent must account to his principal, and cannot set up the *jus tertii* in an action by his principal against him. It was held that the judge was right, and that the verdict ought to stand. There were many authorities, said Alderson, J., which were cited for the plaintiff, which, without doubt, established that an agent must account to his principal, and cannot set up the *jus tertii* in an action by his principal against him. But the court think, said he, that all those cases were distinguishable from the present, upon the ground that the jury had found that the plaintiff's possession of the goods arose out of a fraud concerted between him and the insolvent; and on this ground the verdict might well stand consistently with those cases. "We are very glad," the learned judge observed, "that this case can be thus decided consistently with the general rules of law, as it is obviously in conformity to the substantial justice of the particular case." (a)

§ 337. Again, in *King v. Richards*, in Pennsylvania,³ the question was, whether the defendants, the bailees of goods delivered to them as common carriers, ought to be permitted to show, in an action brought by the bailors or their assignees, that the bailors had no right to the goods whatever. The defendants were com-

¹ Story on Agency, § 217.

³ *King v. Richards*, 6 Whart. 418.

² *Hardman v. Willcock*, 9 Bing. 382, n.

(a) And see *Bates v. Stanton*, 1 Duer, 79; *Cheesman v. Exall*, 6 Exch. 341; *Clough v. London R. L. R.* 7 Ex. 26.

mon carriers between New York and Philadelphia, and had signed a receipt for certain goods as received of A, which they promised to deliver to his order. In trover by the indorsees of this paper, who had made advances on the goods, it was held that the defendants might prove that A had no title to the goods; that they had been fraudulently obtained from the true owner; and that, upon demand, they had delivered them up to the latter. Kennedy, J., who delivered the opinion of the court, considered that it might be correct to hold, where the real owner of the property does not appear and assert his right to it, that the carrier shall not be permitted, of his own mere motion, to set up, as a defence against his bailor, such right for him.

§ 337 *a*. There can be no doubt that if a bailee receive goods, and the bailor has no title to them, and they are taken from the custody of the bailee by the authority of the law, it will be a defence of an action brought against him by the bailor for a non-delivery. (*a*) And, although in general an agent cannot dispute the title of his principal, yet this doctrine will not protect goods received by a bailee from an execution against the person depositing them; and if goods are taken from a wharfinger or warehouseman by lawful process, he can protect himself in a suit brought against him by the owner.¹

§ 338. If the carrier pays damage for the loss of goods, it is of course tantamount to a safe delivery, and he is consequently entitled to his freight.² But an acceptance of the goods by the owner, after they have received damage in consequence of the carrier's negligence, is no bar to an action for such damage; for, as it has been already laid down, nothing short of a release or satisfaction constitutes such a bar.³

¹ *Burton v. Wilkinson*, 18 Vt. 101. And see *D'Anjou v. Ball*, 3 Harris & J. 206.

² *Hammond v. M'Clures*, 1 Bay, ³ *Ante*, § 333, and *Bowman v. Teall*,

(*a*) *Bliven v. Hudson River R.* 35 Barb. 188; 36 N. Y. 403. *Van Winkle v. U. S. Mail Steamship Co.* 37 Barb. 122. In *Wareham Bank v. Burt*, 5 Allen, 113, it is held that a common carrier, who, by a written agreement with the owner of notes, has undertaken to procure their renewal or to return them, cannot excuse himself for the non-performance of his undertaking, by proving that an indorser, to whom he had delivered them for examination and comparison, prior to the renewal, was summoned as trustee of a subsequent indorser, and thereupon refused to give them up, or to renew them. See *Rogers v. Weir*, 34 N. Y. 463.

§ 339. The exercise of the right of stoppage in transitu, or the right of stopping the goods in the custody of the carrier during their transit, affords a justification for non-delivery to the consignee. Whenever the right in question exists, and notice has been given to the carrier, after he has received the goods for carriage, and during their transit, not to deliver them over, the carrier is not only excused for non-delivery to the consignee, but he is also subject to an action, if, after such notice and tender of the freight, he should refuse to redeliver the goods. The effect of the notice and tender is to dispossess the consignee, and is so complete a re-vesting of the property in the consignor, that if the goods, notwithstanding the notice, are placed in the hands of the consignee, and are subsequently transferred to his assignees, in case of his bankruptcy, they will be subject to an action of trover for them at the suit of the consignor.¹

§ 340. We proceed further to notice the right of stoppage in transitu, so far as the mode of exercising it, and the termination of it, are nearly allied to the duties and obligations of carriers. The principal question to be determined when the inquiry is as to the extent of the vendor's power to stop in transitu, as the technical phrase denotes, is the duration of the transit of the goods sold. The authorities which have been reviewed on the subject of delivery establish the proposition, that in all cases of the sale and transmission of goods, the transitus is at an end when the property comes either into the actual possession of the vendee, or arrives at that place where, by his authority, it is destined for his use, or to await his orders. The consignee must have taken such actual or constructive possession of the goods as owner, in order to constitute a determination of the transit.² It is not necessary, in order to divest the consignor's right to stop goods in transitu, that they should have been taken by the very hands of the consignee himself; they may be marked, for instance, by the provisional assignee, if a bankrupt, before arrival at the place where the

there cited from 23 Wend. 306. And see also *Willoughby v. Backhouse*, 2 B. & C. 821; *Baylis v. Usher*, 4 Moore & P. 790.

¹ *Litt v. Cowley*, 7 Taunt. 169. *Stokes v. De La Rivière*, cited in

Bothink v. Inglis, 3 East, 397. *Syeds v. Hay*, 4 T. R. 260.

² See *James v. Griffin*, 2 M. & W. 623; *Dixon v. Baldwin*, 5 East, 184; *Edwards v. Brewer*, 2 M. & W. 375; *Townley v. Crump*, 4 A. & E. 58.

consignee is in the habit of receiving them;¹ and in some cases common carriers, packers, and wharfingers may stand in the character of agents for the purpose of receiving goods or holding goods; a delivery to whom would be equivalent to a delivery to the consignee himself.² The question always is, whether the party to whom the goods actually came be an agent, so far representing his principal as to make the delivery to him, a full, effective, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as carrier or means of conveyance to the principal, in a mere course of transit towards him.³

§ 341. If a man be in the habit of using the warehouse of another, whether that of a carrier or wharfinger, as his own, making it a depository of his own goods, and disposing of them there, the transit terminates with the arrival of the goods at such depository.⁴ But this must be understood as extending only to the instances where a delivery into the warehouse has been perfected, or the consignee has obtained entire control over the goods, prior to his insolvency. Thus, the mere arrival of a ship at a wharf, without any delivery of the goods out of the hold of the ship, is not sufficient to constitute a termination of the transit, even

¹ *Ellis v. Hunt*, 3 T. R. 464.

² Cross on Lien and Stopp. in Transitu, 371.

³ *Bolin v. Huffnagle*, 1 Rawle, 9. Goods, purchased by one at a distance and forwarded to a point, and there taken by a carrier of the purchaser, to be transported to the residence of the purchaser, may be stopped in transitu on the failure of the purchaser, and before they reach his residence. *Buckley v. Farniss*, 15 Wend. 137. No case is found in the books precisely like, in its prominent circumstances, the case of *Sawyer v. Joslin*, in Vermont, 20 Vt. 172. In that case it appeared, that goods were shipped at Troy and directed to the vendee at Vergennes, and were landed upon the wharf at Vergennes, which was half a mile from the vendee's place of business; and it was proved, that the wharf was the usual place

of the vendee's receiving the goods in that town, and that, after they were landed upon the wharf, neither the wharfinger nor any person for him, or for the carriers, had any charge of the goods, but that it was usual for the vendee, and others who received goods at that wharf, to receive the goods upon the wharf and transport them to their places of business; and it appeared that the goods were not subject to any lien for freight or charges. It was *held*, that the wharf was the place of ultimate destination of the goods intended by the consignor; and that the goods, when landed there, came into the constructive possession of the vendee, and were beyond the bounds of the vendor's right of stoppage in transitu.

⁴ *Rowe v. Pickford*, 8 Taunt. 83.

And see *Hurry v. Mangles*, 1 Camp. 452.

though the wharf be customarily used by the consignee as the place of deposit for the goods shipped by his direction.¹ Under such circumstances it has been expressly held that there is not such a delivery to, or appropriation made by the consignee, as to deprive the consignor of the right of stoppage in transitu.²

§ 342. A mere commencement of delivery, not so far completed as to enable the consignee to take actual possession, cannot be construed into a determination of the transit. Where a quantity of iron was delivered to a carrier to be conveyed to a vendee, and the carrier, having reached the vendee's premises, landed a part of the iron at his wharf, but finding that he had stopped payment, reloaded the same on board his barge and took the whole of the iron to his own premises; it was held that there was no delivery of any part of the iron so as to divest the consignor of his right to stop in transitu; the special property remaining in the carrier until the freight was paid or tendered for the whole cargo, or until he had done some act showing that he assented to part with the possession of the goods without payment of the freight.³

§ 343. If an agent be merely clothed with a specific and limited authority to forward the goods to a particular destination, the transit is not determined until the goods have reached the place named by the buyer to the seller as such destination; for, in such case, the warehouse of the agent is the mere resting-place for the goods.⁴ And if goods, in the course of their journey, reach the hands of an agent thus confined to a particular order of destination, the case will not be varied by the circumstance that he has paid the dues on the carriage. As where an agent at Southampton, acting under a general authority from a draper at Guernsey, to forward to him there all goods which arrived to his direction at Southampton, received, in consequence, a quantity of goods, upon which he paid the carriage and the wharfage dues, and selected the ship by which he forwarded the goods; it was held that the transit was not ended at Southampton, but that the vendor might stop them after they had been put on board the vessel for Guernsey.⁵

§ 344. The delivery to an agent not invested with any direction

¹ See *ante*, § 300.

² *Tucker v. Humphrey*, 4 Bing. 516.

³ *Crawshay v. Eades*, 1 B. & C. 181.

⁴ *Coates v. Railton*, 6 B. & C. 422.

And see *ante*, § 75.

⁵ *Nicholls v. Le Feuvre*, 2 Bing. N. C. 81.

as to the further transit of the goods, may be rendered incomplete by conditions annexed by the vendor at the time of the delivery.¹ For, although, upon an absolute delivery of goods to a packer of a purchaser, who has no warehouse of his own, the transit is in general at an end, yet if the goods be delivered to him upon the understanding that they are to be paid for in ready money, he becomes a trustee for the vendor, and it would contravene his duty to deliver them to the purchaser until paid for accordingly.²

§ 345. But in the instances in which it has been said, that the goods must come to the corporeal touch of the vendee, in order to oust the right of stopping in transitu,³ it is a figurative expression, rarely if ever true.⁴ If it be predicated of the vendee's actual touch or of the touch of any other person, it comes in each instance to a question, whether the party to whose touch they actually come be an agent so far representing the principal as to make a delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or means of conveyance to, or on account of, the principal, in a mere course of transit towards him. If the transit be once at an end, the delivery is complete, and the transitus for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination.⁵ Hence, where by arrangement an intermediate delivery occurs before the goods reach their ultimate destination, it becomes necessary to inquire whether the party to whom they are so delivered is invested with the power to receive them, and to alter their destination; or is a mere agent to see them forwarded in accordance with original directions. If invested with a general and unlimited authority in this respect, the transitus ends on the arrival of the goods into his hands, for, as between the buyer and the seller, this is the ulterior delivery in view.⁶ It is not merely a constructive, but an actual delivery.⁷

¹ *Owenson v. Morse*, 7 T. R. 64.

² *Loeschman v. Williams*, 4 Camp. 181. *Goodall v. Skelton*, 2 H. Bl. 316.

³ See *Ellis v. Hunt*, 3 T. R. 464.

⁴ See Cross on Lien and Stopp. in Trans. 371, 372; Whit. on Lien, 206.

⁵ Cross, *supra*. *Dixon v. Baldwin*, 5 East, 184. *Jackson v. Nichol*, 5 Bing. N. C. 508.

⁶ *Leeds v. Wright*, 3 Bos. & P. 320. *Scott v. Pettit*, 3 Bos. & P. 469.

⁷ Cross, *supra*.

The distinction here made is not in discordance with the two preceding sections.

§ 346. It was formerly ruled, that a completion of the journey was necessary to defeat the right of a vendor to stop in transitu, or to re-seize goods on non-payment of the price, and the insolvency of the buyer.¹ But in a later case than the one referred to, Lord Alvanley expressed himself to be directly opposed to that doctrine which was laid down by Lord Kenyon. "If," said he, "in the course of the conveyance of the goods from the vendor to the vendee, the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them. So, though it has been said, that the right of stoppage continues until the goods have arrived at their journey's end, yet if the vendee meet them upon the road, and take them into his own possession; the goods will then have arrived at their journey's end with reference to the right of stoppage."² In conformity with this opinion of Lord Alvanley is the judgment of Chambre, J., who had little doubt that if the consignee intercepts the goods in their passage, before the consignor has exercised his right of stopping in transitu, and they are actually delivered from the carrier before they get to the end of the journey, such a delivery to the consignee will be complete.³

§ 347. It is not, therefore, a necessary consequence, that because, when a person orders goods to be delivered at a particular place, the transitus continues in general until they have been delivered accordingly, the consignee may not, under any circumstances, anticipate the delivery.⁴ If, for instance, before the goods reach their ultimate destination, a vendee directs a postponement of their delivery, or does any other act equivalent to taking possession of them, the transitus may be previously determined. Thus, taking samples from the whole stock, and directing the

¹ *Holst v. Pownal*, 1 Esp. 240.

² *Mills v. Ball*, 2 Bos. & P. 461.

³ *Oppenheim v. Russell*, 3 Bos. & P. 42. See also the doctrine of Lord Kenyon repudiated in *Foster v. Frampton*, 6 B. & C. 107. Where consignees have made advances to the consignor, they have a paramount lien upon the

goods for the advances, and the consignor has no right to stop them in transitu, or to divert them in any manner. *Burritt v. Rensch*, 4 McLean, 325.

⁴ See Cross on Lien and Stopp. in Trans. 381.

carrier to keep the goods in his warehouse until he receives further directions, constitutes the carrier the consignee's warehouseman; and his possession is as much the possession of the consignee as if the latter had taken the whole bulk into his own warehouse.¹ (a)

CHAPTER IX.

OF THE RIGHTS OF CARRIERS. — RIGHTS OF POSSESSION, OF LIEN, AND OF ACTION FOR FREIGHT.

§ 348. BY virtue of the delivery of goods to a carrier for transportation, there is vested in him a special property, which in the first place authorizes him to maintain an action against any person who disturbs his possession of, or does any injury to, the goods; and the reasons are, that he has an interest in the transportation, and is responsible for injuries to the goods by loss or otherwise, during their transit.² (b) It is an old doctrine, that every bailee has a temporary qualified property in the things of

¹ Foster v. Frampton, *ub. sup.*

² Bac. Abr. Contract, C. Goodwin v. Richardson, Roll. Abr. 5. Wilbraham v. Snow, 1 Vent. 52, 2 Saund. 47. "If a common carrier has goods delivered to him to carry to a place, and a stranger takes them out of his possession, and converts them to his own use, an action of trover and conversion lies by the carrier against him; for he has a special

property in the goods, and is to give satisfaction to the owner for them." Per Brampt, C. J., in Goodwin v. Richardson, *ub. sup.* Dunlop v. Thorne, 1 Rich. 213. Morgan v. Congdon, 4 Comst. 551. Bailey v. Shaw, 4 Foster, 297. White v. Vann, 6 Humph. 70. Little v. Fossett, 34 Maine, 545. Ely v. Ehle, 3 Comst. 506. Steamboat Co. v. Atkins, 22 Penn. State, 522.

(a) See London R. v. Bartlett, 7 H. & N. 400.

(b) The Propeller Commerce, 1 Black, 574. Merrick v. Brainard, 38 Barb. 574. In Hagerstown Bank v. Adams Exp. Co. 45 Penn. State, 419, bank-bills of the Hagerstown Bank were sent by the Adams Express Co., to be delivered at the bank. On the way, an agent of the company while insane took a package of bills and destroyed it. As soon as the loss was known, but before the manner of it was discovered, the company paid the bank for the loss. Held, that a suit would lie by the carrier against the bank for the amount of the bills destroyed.

which possession is delivered to him by the bailor, and has, therefore, a possessory action, or an appeal in his own name, against any stranger who may damage or purloin them.¹ Mr. Justice Story deduces from the numerous authorities he has cited in his work on Bailments, as the true doctrine, "that every bailee ought to have a general right of action against mere wrong-doers to the property, while in his possession, whether he has a special property therein or not, because he is answerable over to the bailor; for (as it has well been said²) a man ought not to be charged with an injury to another, without being able to resort to the original cause of that injury, and in amends thereof to do himself right."³ "If property be forcibly or clandestinely taken from the possession of one having a lien upon it, he may reclaim it as his property in any proper form, and replevin is such a form."⁴ For the reason that the owner or the master of a vessel is liable for goods he has to transport, which are wrongfully detained by revenue officers, he has a remedy over against the officers for such illegal detention."⁵

§ 349. The carrier's property in the goods is not absolute, for the very obvious reason, that his contract is for restitution.⁶ As a general rule, therefore, he has no right to sell or dispose of the goods intrusted to him for transportation. Accordingly, if the master of a vessel make a new bill of lading of the goods on board, in his own name as owner, and the goods are sold to one who was ignorant of the fraud, the real owner may sue the purchaser for their value and recover.⁷ (a)

§ 349 a. Although a carrier by sea cannot effect an insurance

¹ Year Book, 21 Hen. 7, 14 b, 15 a, cited in Jones on Bailm. 80. And see 2 Bl. Com. 452; Story on Bailm. § 93 *et seq.*, and *ante*, § 4.

² Bac. Abr. Bailment, D.

³ Story on Bailm. § 93 *f.* And see *Waterman v. Robinson*, 5 Mass. 303.

⁴ *Young v. Kimball*, 23 Penn. State, 193.

⁵ Action against the owner of a vessel, for non-delivery of ten pipes of wine. "The ship was detained at Jamaica, for a supposed violation of

the revenue laws, but on appeal, the sentence of condemnation was reversed, and it was said by Lord Ellenborough: "You have an action against the officers. The shipper can only look to the owner or master of the ship." *Gosling v. Higgins*, 1 Camp. 451.

⁶ See Story on Bailm. § 93; *Swift v. Moseley*, 10 Vt. 208.

⁷ *Saltus v. Everett*, 20 Wend. 275. *Powell v. Bucks*, 4 Strob. 247.

(a) *Bailey v. Shaw*, 4 Foster, 297. See *post*, § 431.

against the perils of the navigation, from the consequences of which he is exonerated by the bill of lading, yet an inland carrier, in whose favor no such exception is usually made, has an insurable interest, or a right to provide an indemnity against such accidents to the property placed in his hands, as will render him liable under his contract.¹ (a)

§ 350. Where certain carriers by water of a quantity of salt, in Indiana, purchased a boat on their way to ascend the river towards the place of destination, and deposited with the seller a part of the load as security for the price of the boat, informing him they were carriers; it was held, that such disposal of the property was unauthorized, and that the right to the possession of it continued in the original owner, and that a *bonâ fide* purchaser of goods out of market overt, could not hold against the true owner.²

§ 351. In the above case the purchaser from the carriers was told that they were carriers, and he was thereby put on his guard. But it was contended in a case in Pennsylvania, that a wagoner had such a special property in the goods which were sent by him to be delivered to a certain person, as authorized him (the carrier) to dispose of them; and the ground taken was, that the party who places confidence in another should be the loser by his breach of faith, and not an innocent purchaser. But the court held, that although the carrier is vested by law with a special property by virtue of which he may maintain an action against a wrong-doer, yet that special property does not impair the general property of the true owner, or give to the carrier an authority to sell. In Pennsylvania, there are no markets overt, by a sale, in which the property can be altered; so that a sale by a carrier of goods intrusted to him, in the street at Pittsburg, gave no additional validity to the transaction.³

§ 352. So, a carrier by sea, although he has, by the law merchant, a lien on goods carried by him for the payment of freight, yet he has no right of his own mere motion, to cause a sale for the

¹ *Crowley v. Cohen*, 3 B. & Ad. 478. *Van Natta v. Mutual Ins. Co.* 2 Sandf. 490. *Chase v. Washington Ins. Co.* 12 Barb. 595. ² *Kitchell v. Vanadar*, 1 Blackf. 356. ³ *Lecky v. M'Dermott*, 8 S. & R. 500. The decision in this case is confirmed in *Rapp v. Palmer*, 3 Watts, 178.

(a) *London R. v. Glyn*, 1 Ellis & E. 652.

payment of freight;¹ (a) and a carrier by sea and a carrier by land stand in the same relation to the owner of the goods.²

§ 353. If the carrier is instructed to sell the goods he undertakes to carry at a certain price, or to store them, without any stipulation as to payment of freight, he may demand the freight from the warehouseman on delivery; but it will be a conversion, if, without such demand, he stores the cotton as his own; and if he refuses to deliver the goods for any other cause than the non-payment of freight, he cannot avail himself of the want of a tender of the freight.³

§ 354. It is clearly, however, an exception to the general rule, that the master of a ship in foreign parts may hypothecate or even sell the cargo, as well as the ship, when absolutely necessary to enable him to continue his voyage. In such case of necessity, it has always been held, says Lord Tenterden, that the master, if he cannot otherwise obtain the money, may sell a part of his cargo to enable him to convey the residue to the destined port;⁴ and the same doctrine has been fully recognized by the courts of this country.⁵ In case of wreck or stranding, if the master have no means of transshipment, he has a right to sell, but the great necessity of it must clearly exist.⁶ The acknowledged rule is, that the mere shipment of merchandise does not confer on the master of the vessel authority to dispose of the goods, and in case of necessity, the burden of proof showing the necessity lies upon the purchaser.⁷ Where the consignee refuses to receive damaged goods of the carrier, and he sells them, he is accountable to the

¹ Hunt v. Haskell, 24 Maine, 339.

² Saltus v. Everett, 20 Wend. 267.

³ Blair v. Jeffries, Dudley, S. C. 59.

⁴ Abbott on Shipp. 164; where, in consequence of damage to a ship during the voyage, it becomes impossible to prosecute the adventure, the master has authority to sell her for the benefit of all parties interested; and a person employed by him

to superintend the sale may lawfully pay over the proceeds to him, or to his order. Ireland v. Thomson, 4 C. B. 149.

⁵ Abbott on Shipp., p. 165, n., referring to American cases.

⁶ See *ante*, n. 4 to § 187; U. S. Ins. Co. v. Scott, 1 Johns. 106.

⁷ Saltus v. Everett, 20 Wend. 267. Myers v. Baymore, 10 Barr, 114.

(a) A carrier has no right at common law to sell goods to enforce his lien. Briggs v. Boston R. 6 Allen, 246. See Staples v. Bradley, 23 Conn. 167. And if he keeps the goods to enforce payment of his lien, he cannot add a charge for keeping them. *Somes v. British Empire Shipping Co.* 3 H. L. Cas. 333.

consignor or owner for so much as will indemnify him, and not paid by insurer.¹

§ 355. The usage of trade may also operate to take the case from the application of the general principle, that a sale by a carrier vests no title; as if it be the usage for the carrier to act as an agent for the sale of the goods intrusted to him for carriage.² But the usage to have this effect must have every requisite to give it validity; that is, it must be long established, certain, uniform, and reasonable.³(a)

§ 356. But the right of common carriers, which to them is of the most importance, consists of one of the methods prescribed by the law for the recovery of their hire. They are bound, as has already appeared, to carry goods for a reasonable reward, unless their vehicle be already full, or the risk sought to be imposed upon them be extraordinary, or the goods be of such a nature as they cannot convey, or are not in the habit of conveying; and in case of refusal are liable to an action. Still, if goods are brought to them for the purpose of conveyance, no action will lie against them for refusal to accept them, unless there was at the time an offer of the carriage price.⁴ If they undertake to carry them without having been previously paid, the law presumes that they consider the possession of the goods as a sufficient security for their expected remuneration; and, in conformity with this presumption, it authorizes them to retain this possession at the end of the transit, until they have received satisfaction for their labor, &c.; and this is the foundation of a lien.⁵(b) If this security is

¹ *Cassilay v. Young*, 4 B. Mon. 265.

² *Ante*, §§ 104-107.

³ *Rapp v. Palmer*, 3 Watts, 178. And see *ante*, § 106. "If a man," says Bayley, J., in *Pickering v. Busk*, 15 East, 44, "puts goods into another's custody, whose common business it is to sell, he confers an implied authority to sell;" and the cause was decided on that ground.

⁴ See *ante*, § 124; *Cross on Lien*, &c., 282; *Jackson v. Rogers*, 2 Show. 327; *Lane v. Cotton*, 1 Ld. Raym. 646; *Edwards v. Sherratt*, 1 East, 60; *Riley v. Horne*, 5 Bing. 217; *Batson v. Donovan*, 4 B. & Ald. 21; *Cole v. Goodwin*, 19 Wend. 234.

⁵ See *Jones on Carr.* 99; *Story on Bailm.* § 588; *Crouch v. Great Northern R.* 9 Exch. 556, 25 Eng. L. & Eq. 449; *Morgan v. Congdon*, 4 Comst.

(a) See *Cole v. North Western Bank*, L. R. 10 C. P. 354.

(b) A carrier has no lien for the transportation of mailable matter over a usual mail route, such carriage being contrary to law. *Hill v. Mitchell*, 25 Ga. 704. Nor has he a lien for transporting goods belonging to the govern-

waived by a delivery of the goods before the payment of the hire, recourse must then be had to an action for its recovery; or for the recovery of what is denominated freight. "It is clear," says Smith, "in regard to the remuneration to which a carrier is entitled, he must carry for a reasonable amount; and if he insist on receiving more before conveying the goods, or before parting with them, an action for money had and received will lie against him for the excess."¹ (a) But it must be borne in mind, in relation

551. It has appeared that there has been a degree of discrepancy in opinion as to whether private carriers, or carriers for hire, who are not common carriers, have a lien on the goods carried for the carriage. *Ante*, § 66. But it has long been held, that common carriers have a lien. *Skinner v. Upshaw*, 2 Ld. Raym. 752. For American cases recognizing the doctrine, see *Goodman v. Stewart, Wright*, 216; *Hayward v. Middleton*, 3 Const. (S. Car.) 186; *Slater v. Gailard*, 1 Const. (S. Car.) 428. Although a consignee, on a bill of lading, acquires a property in the consignment, and may sell while the goods are in transit, and the goods have not been paid for, the carrier has a right to retain possession of the goods against

the consignee until the carriage is paid for. *Jordan v. James*, 5 Ohio, 49. And see *Bowman v. Hilton*, 11 Ohio, 303.

¹ Smith, *Mer. Law* (5th ed.), 291, citing *Wyld v. Pickford*, 8 M. & W. 443. If such goods are tendered to a carrier, and he gives notice to the owner that he will not be responsible for loss unless a more than ordinary insurance be paid, which the owner declines to pay, but leaves the goods to be carried; it appears that the carrier receives them on the footing of such notice, his liability becomes limited, and he is only bound to use the ordinary care of a bailee for reward. *Ibid.* And see per Parke, B., *Fowles v. Great Western R.* 7 Exch. 700.

ment of which he is a citizen. *Dufolt v. Gorman*, 1 Minn. 301. See also *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 15; *Briggs v. Light-boats*, 11 Allen, 157, where the subject of liens on government property is considered at length. If a carrier, whose duty of transportation is ended, causes goods to be carried to the place of business of the consignee, he has no lien on them for such additional transportation, unless there is a usage so to carry them, or unless he has received authority from the consignor or consignee to this effect; and the facts that the goods are addressed to the consignee at his place of business, and that no bill of lading has been given for them, make no difference. *Richardson v. Rich*, 104 Mass. 156.

(a) In *Holford v. Adams*, 2 Duer, 471, bonds valued at forty thousand dollars were carried by the Adams Express Company from New Orleans to New York. Compensation was claimed at the rate of one per cent on the value. *Held*, that as there was no express contract as to the amount of compensation, the company was only entitled to a reasonable compensation; and that as by the terms of the contract the company was not liable for loss or damage arising from any other cause than the fraud or gross negligence of their servants, and as packages of great value were not treated with greater care than

to the obligation of a common carrier to receive goods, and to transport them, that his obligation is correspondent with the nature of his employment; and if he be a carrier of only certain kinds of property from one given place to another, he cannot be compelled against his will to become a carrier for intermediate places.¹ It is proposed to consider, 1st, the right of the carrier before the goods are delivered over; and, 2dly, his right after the possession has been parted with.

§ 357. *First.*—Liens are either by the common law, usage, or agreement, and are of two denominations: the one a particular or specific lien, given by the policy of the common law, and the custom of the realm, and attaching only upon the specific chattels, for the unpaid price, or carriage thereof, or for work and labor bestowed thereupon; (a) the other, a general lien, authorizing detention of the goods, not only for demands arising out of the article retained, but for a general balance of accounts, relating to dealings of a like nature. The latter is an encroachment upon the common law, and has consequently been regarded by courts with much jealousy. Hence it is that, in the absence of some general usage affecting the custom of the realm, or an express agreement between the contracting parties, or evidence to show

¹ *Thurman v. Wells*, 18 Barb. 500. *Crouch v. Great Northern R.* 11 Exch. And see *ante*, § 100 *et seq.*, § 106 *et seq.*; 742; 34 Eng. L. & Eq. 573.

those of less value, there was no reason for enhancing the price in proportion to the value, unless a general, uniform, and notorious usage was proved to this effect.

(a) The right of the carrier to a lien is a personal one, and cannot be set up by a wrong-doer who has obtained possession of the goods, in defence to a suit against him by the owner. *Ames v. Palmer*, 42 Maine, 197. A carrier who carries goods for a lessee of them has no lien as against the owner. *Gilson v. Gwinn*, 107 Mass. 126. See also *post*, § 365, n. Where goods are carried over several successive routes, there is a custom sanctioned by law, for each carrier to collect his freight of the one to whom he delivers the goods, and the last carrier has a lien on them, subject to the exceptions stated, *post*, § 365, for his own freight and for the advances paid by him. *Stevens v. Boston & Worcester R.* 8 Gray, 262. *Briggs v. Boston R.* 6 Allen, 250. *White v. Vann*, 6 Humph. 70. *Wells v. Thomas*, 27 Misso. 17, where there was a special contract made with the first carrier to deliver for a less sum than the last carrier claimed a lien for. This does not, however, extend to advances wholly foreign to, and disconnected with, any cost or charge for transportation. *Steamboat Virginia v. Kraft*, 25 Misso. 76. See also *Travis v. Thompson*, 37 Barb. 236.

that such was their common mode of previous dealing, a further extension of the general privilege has met with much discouragement, and a jury is warranted in negating any right beyond the specific lien to which parties are entitled at common law.¹ As it has been held in New Jersey, a common carrier has a lien on goods in his possession, but *prima facie* only for the transportation of those particular goods, and not for transportation of other goods, also, which do not remain in his possession.² (a)

§ 358. To establish a general lien on the ground of usage, strong and satisfactory evidence must be adduced of ancient, numerous, and important instances in which the right has been exercised.³ Therefore, where the jury found that the plaintiffs had no knowledge of such usage, though there was proof, unopposed by other evidence, of its having been exercised by the defendants and various other common carriers throughout the neighborhood, for ten or twelve years before, and in one instance so far back as thirty years, the court refused to grant a new trial.⁴ When, on the other hand, the usage is general, and prevails to such an extent that all parties contracting may be supposed conversant of it, the usage then becomes evidence of a contract, or raises a presumption that the parties contracted with reference to it.⁵

§ 359. As common carriers are bound to carry goods for a reasonable reward, it might reasonably be supposed that in their case a more favorable and extended construction than that above mentioned would have been put upon the doctrine of lien. On the contrary, the lien of a common carrier for his general balance is never favored, unless arising in point of law from an implied agreement to be inferred from the general usage of trade, proved by numerous clear and satisfactory instances; and a few recent instances are insufficient to establish the requisite proof of it.⁶

§ 360. By express stipulation with their customers, carriers may undoubtedly secure to themselves a general lien; and a pro-

¹ Cross on Lien, &c. 15. Rushforth v. Hadfield, 6 East, 522.

² Hartshorne v. Johnson, 2 Halst. 108.

³ A doctrine which applies to commercial usage generally. See *ante*, §§ 229, 301.

⁴ Rushforth v. Hadfield, *ub. sup.*

⁵ Holderness v. Collinson, 7 B. & C. 212. Rex v. Humphrey, 1 M'Clel. & Y. 191.

⁶ Rushforth v. Hadfield, *ub. sup.*

(a) Leonard v. Winslow, 2 Grant, Cas. 139.

mulgation by a carrier of a notice to that effect, it is said, might subject the goods of a customer cognizant of the notice, to be detained for a general balance due from him.¹ But in *Kirkman v. Shawcross*,² Lord Kenyon declared that common carriers have no right to say that they will not receive any goods but on their own terms. He said further, however, be that as it may, when a common carrier has given notice that he would not be answerable for goods of a particular denomination unless he received a certain premium, and that notice has come to the knowledge of the party suing, the courts have considered it as an agreement binding on both parties. And it is strongly implied in *Rushforth v. Hadfield*,³ that a common carrier may, on the same principle, create a general lien as against the person who employed him, by means of notice.⁴

§ 361. Where a carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners, it was held that this notice did not authorize him to retain the goods of the principal for a general balance due to him from the factor, though they were addressed to the latter.⁵ Even if the notice in this case had been that all goods, to whomsoever belonging, should be subject to a lien for every general balance due from the person to whom they were addressed, it seems doubtful⁶ whether it would have been of any avail; for Holroyd, J., there said, that a factor cannot by any agreement, either express or implied from the course of dealing, subject the property of his consignor and employer to the payment of his own debts; and Best, J., doubted whether a carrier could make so unjust a regulation.⁷

¹ Cross on Lien, &c. 283. See Abbott on Shipp. 286. An agreement entered into by a number of dyers, pressers, &c., at a public meeting, that they would not receive any more goods to be dyed, but on condition that they should have respectively a lien on those goods for their general balance, is good in law; and any one who, after notice of it, delivers goods to either of those persons, must be considered as having assented to those terms, and cannot demand his goods until he has paid

the balance of his general account. *Kirkman v. Shawcross*, 6 T. R. 14.

² *Kirkman v. Shawcross*, *ub. sup.*

³ *Rushforth v. Hadfield*, 6 East, 224.

⁴ Kent considers that it is a point still to be settled by judicial decision. 2 Kent, Com. 637. See note by Metcalf to Yelv. p. 67.

⁵ *Wright v. Snell*, 5 B. & Ald. 350.

⁶ *Jones on Carr.* 101.

⁷ Doubts have been entertained how far this decision may have been

§ 362. It has been decided that if there be an agreement for a general lien between the carrier and the consignee, this will not affect the right of stoppage in transitu inherent in the consignor; and therefore the consignor, upon giving notice of his intention to exercise this privilege, will be entitled to a redelivery upon the payment of the carriage price of the particular consignment.¹

affected, had the notice been more comprehensive in its terms, and included the goods, not only of the respective owners, but of every person, to whomsoever addressed; and whether, in such case, the carrier might not have been entitled to a general right of detention against all parties. Cross on Lien, &c. pp. 283, 284. With the view to enable such enlargement of power, Mr. Chitty, in his *Practice of the Law* (vol. 1, p. 493), has suggested the expediency of introducing words to the effect, "that the goods of all persons dealing with the party in his trade, and whether belonging to the customer, or to any other person or persons, or in which he is in any respect interested, whether for a lien or otherwise, or which may be in the possession of the advertiser, or whether going to or from his manufactory or premises, must be understood to be, and will be, subject to a general lien for all moneys due to the advertiser, as well from the customer as from any person or persons entitled to or interested in such goods." But it is considered (Cross on Lien, &c. p. 284) doubtful if such notice would be effectual. "To grant the validity of so extensive a claim, would be to allow, by special agreement, a power against third parties not recognized by the courts, even though sanctioned by immemorial custom (*Leuckhart v. Cooper*, 3 Bing. N. C. 99); for to give validity and effect to usage, it has been decided that it must be reasonable as well as ancient, and it can scarcely be contended, that the detention of the goods of the consignor, for the

debt of the consignee, is either just or reasonable. Ibid. The principle of such decision should therefore, and probably would, regulate the judgment, were the question suggested to come before the court. The precautionary measure proposed in the form of notice may, at least, be pursued *majori cautela*; but, to permit the annexation of terms so inconsistent with the general principle, that carriers are compellable to carry the goods of all customers, for reasonable reward, would at once be an abrogation of the rule, and a permissive power vested in carriers, which immemorial custom has not been able to establish in others." "I should doubt," observed Best, J. (*Wright v. Snell*, *ub. sup.*), "if any form of words would be able to establish a liability of such kind. It is, however, sufficient (says he) in the case before the court, to say, that the plaintiff is the owner of the goods, and there being nothing due from him to the carriers, the words of the notice do not impose any liability upon him. If any question should arise, falling within the terms of the notice last given, it would be very fit to consider whether a carrier can make so unjust a regulation as is there attempted." The notice alluded to was, that all goods, from whomsoever received, or to whomsoever belonging, should be subject to a lien, not only for the freight of the particular goods, but also for any general balance that might be due from the person to whom they were consigned or addressed.

¹ *Oppenheim v. Russell*, 3 Bos. & P. 42.

As has already been illustrated, the delivery to the carrier is a qualified, not an absolute delivery to the consignee, and is good to all intents and purposes, except that of defeating the right of the consignor to stop in transitu. It is such as to give the latter a right of resuming possession at any time before the goods come into that situation which gives the consignee a complete dominion over them.¹

§ 363. It is laid down by a late writer,² and other elementary writers who have preceded him, that the obligation of carriers to receive and carry goods for hire exempts them, as in the case of innkeepers, from any necessity to inquire into the title of the parties delivering them; and that for this reason they may retain them against the true owner until the particular carriage be paid, though the true owner prove that they were stolen from him by the person who delivered them to be carried. The only authority which has been generally relied on for this doctrine is the old case of *Yorke v. Grenaugh*, in the trial of which Lord Chief Justice Holt presided;³ and as its authority has been in one instance repudiated in this country, it is proper it should be stated more circumstantially than it has been. The decision was, that if a horse be put up at the stable of an inn by a guest, the innkeeper has a lien on the animal for its keep, whether the animal be the property of the guest or of some third party from whom it has been fraudulently taken, or stolen. It was excepted by the counsel that, "since the horse was brought to the inn by a stranger, the innkeeper cannot detain it for its meat against the right owner; for it may be that this traveller was a wrong-doer or a robber." But the answer of the court was: "Supposing that this traveller was a robber, and had stolen this horse; yet if he comes to an inn, and is a guest there, and delivers the horse to the innkeeper (who does not know it), the innkeeper is obliged to accept the horse; and then it is very reasonable that he shall have a remedy for payment, which is by retainer. And he is not obliged to consider who is owner of the horse, but whether he who brings him is his guest or not." Lord Chief Justice Holt cited the case of an Exeter common carrier; "where A stole the goods and delivered them to the Exeter carrier, to be carried to Exeter, the right owner finding the goods in possession of the

¹ See *ante*, § 339 *et seq.*

² Cross on Lien, &c. 286.

³ *Yorke v. Grenaugh*, 2 Ld. Raym.

867.

carrier, demanded them of him, upon which the carrier refused to deliver without being paid for the carriage. The owner brought trover, and it was held that he might justify detaining against the right owner for the carriage; for when A brought them to him he was obliged to receive them, and carry them; and therefore, since the law compelled him to carry them, it will give him remedy for the premium due for the carriage.”¹

§ 364. The doctrine that a common carrier and a common innkeeper may have a lien on property delivered to them, because the one is bound to receive goods which are offered for transportation, and the other is bound to receive guests with their effects, it has been said, rests upon the authority alone of the above case of *Yorke v. Grenaugh*.² (a) But it was held in *Johnson v. Hill*, at *nisi prius*, in 1822, that if A, under color of legal proceeding, wrongfully seize the horse of B, and take it to an inn where it is kept for several days, the landlord has a lien upon the horse for the keep, and may, therefore, refuse to deliver up the horse to B, until the keep is paid; unless the landlord knew that A was a wrong-doer in seizing the horse.³ Then again, there is said to be an obvious ground of distinction between the cases of carrying goods by a common carrier, and furnishing keeping for a horse by an innkeeper; that, in the latter case, it is equally for the benefit of the owner to have his horse fed by the innkeeper in whose custody he is placed, whether left by a thief, or by himself or agent; in either case food is necessary for the preservation of his horse, and the innkeeper confers a benefit upon the owner by feeding him.⁴

¹ The Reporter says, the doctrine had always been maintained by Holt; and that a common innkeeper may detain a horse brought by a wrong-doer against the true owner, he cites 3 Bulstr. 269, and 1 Roll. 449. The doctrine is stated thus, by Mr. Metcalf, in his learned note in *Yelverton*, on the authority of *Yorke v. Grenaugh*, *ub. sup.*

² *Fitch v. Newberry*, 1 Doug. Mich. 1.

³ *Johnson v. Hill*, 3 Stark. 172.

If a person is stopped with a horse under suspicious circumstances, and the horse is placed at an inn by the police, the innkeeper has no lien on the horse for its keep; and if an auctioneer, by the direction of the innkeeper, sell the horse for its keep, he is liable to be sued in trover by the owner of the horse. *Binns v. Pigot*, 9 Car. & P. 208.

⁴ *Fitch v. Newberry*, *ub. sup.* Abbott, C. J., in *Greenway v. Fisher*, 1 Car. & P. 190, simply says: “As to

(a) See also *Threfall v. Borwick*, L. R. 7 Q. B. 711.

§ 365. In the Supreme Court of Michigan, in 1843, it was expressly held, contrary to the reasoning of the court in *Yorke v. Grenaugh*, and to the decision in the *Exeter* case there cited by Lord Chief Justice Holt, that the doctrine of *caveat emptor* applies with the same force to common carriers as to other persons; and that if common carriers in any way acquire possession of property without consent of the owner, they, like other persons, may be compelled to restore it to such owner; and that the obligation of a common carrier to receive and carry all goods offered, was subject to the condition that the person offering the goods has authority to do so. The court reasoned (and it is submitted if there be not force in the argument) that if a common carrier is in all cases entitled to demand the price of carriage before he receives the goods, and which, if not paid, he may refuse to take charge of them, and if he may reject goods offered by a wrongdoer; he is bound to take care that the person from whom he receives them has authority to place them in his custody. In this case the plaintiffs, by their agents, shipped goods at Port Kent, on Lake Champlain, consigned to them at Marshall, Michigan, care of H. C. & Co., Detroit, by the New York and Michigan Line, who were common carriers, and with whom they had previously contracted for the transportation of the goods to Detroit, and paid the freight in advance. During the transit of the goods, and before they reached Buffalo, they came into the possession of carriers doing business under the name of the Merchants' Line, without the knowledge or assent of the plaintiffs, and were by them transported to Detroit, and consigned to H. P. & Co., of Buffalo, to the care of the defendants, and delivered to the defendants, who were personally ignorant of the manner in which they came into the possession of the Merchants' Line, and of the contract of the plaintiffs with the New York and Michigan Line; although they, and also H. P. & Co., were agents for, and part-owners in the Merchants' Line. The defendants being warehousemen, and forwarders, received the goods and advanced the freight upon them from Troy, New York, to Detroit. On demand of the goods by the plaintiffs, the defendants refused to deliver them, until the freight advanced by them, and their charges for receiving and storing the goods, were paid; claiming a lien on the

a carrier, if, while he has goods, there lie " He does not say but that a carrier may, in all cases, have a lien.

goods for such freight and charges. It was held, in an action of replevin brought for the goods, that the plaintiffs were entitled to the possession of the goods without payment to the defendants of such freight and charges; and that the defendants had no lien upon the goods for the same.¹

§ 366. In the above case, the case of *Buskirk v. Purington*, in New York, was relied on as authority. There property was sold upon condition; the buyer failed to comply with the condition, and shipped the goods on board the vessel of the defendants. On the defendants' refusal to deliver the goods to the owner, he brought trover, and was allowed to recover their value, although the defendants insisted on their right of lien for the freight.²

§ 367. There was a fraud committed upon the true owner of the goods in the case of *King v. Richards*, in Pennsylvania;³ and the decision of the court in that case was, that where A had delivered goods to a common carrier, which he had fraudulently obtained from the true owner, the carrier might prove, in an action against him by A, that the goods had been obtained from the true owner, and that, upon demand made, he had delivered them up to the latter. But in giving their opinion, by Kennedy, J., the court say, that it is sufficient in such cases for the bailee, that he is authorized by law to retain the goods in his possession until he is paid or tendered the amount of what he is entitled to for keeping or carrying them. So that, in this case, the doctrine

¹ *Fitch v. Newberry*, 1 Doug. Mich. 1, and *ub. sup.* A common carrier who innocently receives goods from a wrong-doer, without the consent of the owner, express or implied, has no lien upon them for their carriage, against the owner. No man can be divested of his property without his consent. *Robinson v. Baker*, 5 Cush.

137. *Everett v. Saltus*, 15 Wend. 474. (a)

² *Buskirk v. Purington*, 2 Hall, 561. The decision in this case was confirmed in *Collman v. Collins*, 2 Hall, 569.

³ *King v. Richards*, 6 Whart. 418. And see the case cited *ante*, § 337, and the cases cited in connection with the point decided, § 336.

(a) *Clark v. Lowell* R. 9 Gray, 231. Nor has the carrier a lien in such a case for the freight paid by him to a previous carrier by whom the owner had directed them to be carried, the goods having been carried under a contract with a wrong-doer. *Stevens v. Boston & Worcester* R. 8 Gray, 262. But if by a mistake of the consignor or his agent the goods are carried over a wrong route, the carrier has a lien for his own charges and for all prior charges paid by him. *Briggs v. Boston* R. 6 Allen, 246. See *Nordemeyer v. Loescher*, 1 Hilton, 499.

laid down in *Yorke v. Grenaugh* is clearly recognized. The title of the true owner to recover seems indeed to have been considered quite clear, in *Yorke v. Grenaugh*, if he had only, anterior to the commencement of his action, tendered to the defendant the money due for the keeping of the horse, in the one case, or the sum due for the freight of the goods, in the other.¹

§ 368. The lawful possession of goods being once acquired for the purpose of carriage, the carrier is not obliged to restore them to the owner again, even if the carriage be dispensed with, unless upon being paid his due remuneration; for by the delivery he has already incurred certain risks.² (a) If a person go to a coach office and direct that a place be booked for him by a particular coach, and that be done, and he leaves his portmanteau, the coach proprietor will have a lien on the portmanteau for something, but not for the full amount of the coach fare; but if the party merely leave his portmanteau while he goes to inquire if there be an earlier coach, and no place be actually booked, the coach proprietor has no lien at all.³ But cases of this sort depend much upon the circumstances. A contract was made in South Carolina during the war, with a wagoner, to carry a load of cotton from Lancaster to Richmond, at a specified sum per hundred, for transportation. The carrier attended at the place, and while loading his wagon with the defendant's cotton, news of peace arrived, and he determined not to send the cotton, and made the plaintiff unload. It was held, that an action would lie for the price of carrying the cotton.⁴ In one case it appears that the detention can only be for the amount incurred for carriage; as where goods were taken by the owner from the carrier's wagon, it was held,

¹ In the Court of Queen's Bench, January, 1840, it was held, that where a person brings a carriage to an hotel, at which he stops as a guest, the hotel-keeper has a lien upon the carriage for its standing room, and any labor bestowed upon it; the innkeeper is not bound to inquire whether the carriage really belongs to the guest, but if he received it *bonâ fide* he may retain it against the real owner, however the guest may have obtained posses-

sion of it; but whether he has a lien for the whole bill incurred by the guest, *quære*. *Turrill v. Crawley*, 13 Q. B. 197.

² Story on Bailm. § 685. *Columbian Ins. Co. v. Ashby*, 13 Pet. 331. *Herbert v. Hallett*, 3 Johns. Cas. 93. See *ante*, § 128.

³ *Higgins v. Bretherton*, 5 Car. & P. 2.

⁴ *Davis v. Crawford*, 4 Const. (S. Car.) 401.

(a) See *post*, § 393, n.

that the carrier had no claim for booking;¹ and consequently he could set up no lien before delivery.

§ 369. As the rights as well as the liabilities of carriers by land extend, in the absence of any statute to the contrary, to carriers by water, the owners or masters of general ships and vessels, both on the high seas and on navigable rivers and canals, are entitled to the same particular lien for the price of the carriage of goods delivered to them for transportation; and it is so both by the common law and by the written maritime codes of Europe.²

§ 370. But, according to the principle by which all liens by the common law are regulated, if the master of a vessel once part with the voluntary possession of the goods out of his own or his agent's hands, he loses his lien upon them, and is not authorized by law to reclaim them.³ The intention to relinquish the possession must, however, be clearly manifested. The captain of a ship was allowed a lien on a part of a cargo which had been removed into a lighter alongside of the ship sent by the vendee, but which the captain afterwards fastened to the ship's side, to prevent its final removal.⁴ (a)

¹ Lambert v. Robinson, 1 Esp. 119. v. Smallpiece, 1 Esp. 23. Bigelow

² Abbott on Shipp. Pt. 4, ch. 2, v. Heaton, 4 Denio, 496.
p. 284.

⁴ Sodergren v. Flight, cited in Han-

³ Abbott on Shipp. p. 246. Artaza son v. Meyer, 6 East, 622.

(a) In Bags of Linseed, 1 Black, 108, the court held that the lien of a vessel for freight depends upon possession, and is lost by delivery; but this important qualification of the rule is stated: "In cases of the kind above mentioned, it is frequently, perhaps more usually, understood between the parties, that transferring the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, and that the ship-owner reserves the right to proceed *in rem* to enforce it, if the freight is not paid. And if it appears by the evidence that such an understanding did exist between the parties, before or at the time the cargo was placed in the hands of the consignee, or if such an understanding is plainly to be inferred from the established local usage of the port, a court of admiralty will regard the transaction as a deposit of the goods, for the time, in the warehouse, and not as an absolute delivery; and, on that ground, will consider the ship-owner as still constructively in possession, so far as to preserve his lien and his remedy *in rem*." See also Sears v. Wills, 4 Allen, 212; The Bird of Paradise, 5 Wall. 555; Gaughran v. One hundred and fifty-one Tons of Coal, U. S. C. C. S. Dist. N. Y. 6 Am. Law Rev. 759; Mors-Le-Blanch v. Wilson, L. R. 8 C. P. 227.

Where several cargoes of coal, delivered by their owner upon the wharf of

§ 371. Where the master of a ship, in obedience to revenue regulations, lands goods at a particular wharf, he does not thereby lose his lien on them for the freight. It is true, Lord Kenyon doubted whether the captain parted with his lien under such circumstances;¹ but in *Wilson v. Kymer*,² it was expressly held, that the lien of the ship-owner for freight continued after the landing of the cargo at the West India Docks, although he gave no notice to the company to retain the cargo until the payment of the freight. In England, if goods are placed in the West India or East India Company's Dock warehouses, the shipmaster may give notice to those bodies to detain them until the freight be paid.³

§ 372. Where goods are not required to be landed at any particular dock, and the common practice is to land them at a public wharf, and direct the wharfinger not to part with them until the charges upon them are paid, in such case the wharfinger becomes the shipmaster's agent, and the goods remain constructively in the possession of the latter.⁴

§ 373. But the delivery of a portion of several parcels of goods belonging to one owner and carried on the same voyage does not defeat a lien upon the remainder for the whole freight.⁵ (a) But if there be two contracts to carry, with different termini to the voyage in each contract, no lien attaches for freight under the one contract upon goods shipped under the other, and improperly

¹ *Ward v. Felton*, 1 East, 507.

² *Wilson v. Kymer*, 1 Maule & S. 157.

³ *Faith v. East India Co.* 4 B. & Ald. 630. *Horncastle v. Farran*, 3 B. & Ald. 497. The London Dock Act, 45 Geo. 3, c. 58, § 15, expressly reserves the lien for freight. By 6 Geo. 4, c. 107, § 134, if goods are

landed and sold by the officers of the customs, the freight not having been paid, the produce of the sale is applicable, in the first place, to its liquidation. *Abbott on Shipp*, 300, and *Cross on Lien*, &c. 291, n.

⁴ *Abbott on Shipp. supra*.

⁵ *Abbott on Shipp*. 377. *Cross on Lien*, 290.

a railroad corporation, were successively carried over the railroad, and at the place of destination unladen, assorted, and deposited by the owner's servants in bins on the land of the corporation, adjoining the owner's land, and portions carried away and delivered to purchasers by the owner from time to time, until he became insolvent, *held*, that the corporation had a lien upon the coal that remained for the wharfage and freight of all the cargoes. *Lane v. Old Colony R.* 14 Gray, 143.

(a) *Boggs v. Martin*, 13 B. Mon. 239. *Fuller v. Bradley*, 25 Penn. State, 120. *Lane v. Old Colony R.* 14 Gray, 143.

detained on board by the carrier;¹ for in this as in all other cases, no lien can be acquired by a possession which is unlawful; and hence no lien attaches if the goods directed to one place be improperly carried to another.²

§ 374. An exception to the rule, that a complete delivery will at all times divest the lien, is, that if the possession be put an end to by fraud, the lien revives if possession be recovered.³ And a common carrier who is induced to deliver goods to the consignee by a false and fraudulent promise of the latter, that he will pay freight as soon as they are received, may disaffirm and sue the consignee for possession, in replevin. It is like the delivery of goods to a fraudulent purchaser, or to a purchaser who receives the goods with an intent not to pay, which will avoid the sale.⁴

§ 375. The right of lien is not confined to freight and merchandise, but it extends to the baggage of a passenger, for the recovery of his passage-money; although the master has no lien on the passenger himself, or the clothes which he is actually wearing when about to leave the vessel.⁵

¹ *Bernal v. Pim*, 1 Gale, 17. *Sodergren v. Flight*, 6 East, 622.

² *Wallace v. Woodgate*, Ryan & M. 193. And see *Abbott on Shipp.* 377. If the freight is all consigned to the same person, and the master make a delivery of part of the goods to the consignee, he may retain the residue even against a purchaser, until payment of freight of the whole. But if the goods are sold to different persons by the consignee, and part is delivered, the master has not a lien upon the residue, so as to compel one purchaser to pay freight for what has been delivered to another purchaser; but only for what has been purchased by himself. See *Sodergren v. Flight*, *ub. sup.*; and n. 2 to p. 377 of *Abbott on Shipp.* (Am. ed.).

³ *Bigelow v. Heaton*, 6 Hill, 43. *Ely v. Ehle*, 3 Comst. 506.

⁴ *Bristol v. Wilshire*, 1 B. & C. 514. *Ash v. Putnam*, 1 Hill, 302, and cases there cited.

⁵ *Wolf v. Summers*, before Lawrence, J., at Guildhall, 2 Camp. 631.

In general, the law in relation to passage-money of passengers is the same as that respecting freight. *Howland v. The Lavinia*, 1 Pet. Adm. 126. An innkeeper possesses only the right of specific lien for debts accruing contemporaneously with possession, and it was formerly considered, that he possessed not only a right of lien on the property of his guest, but a power of personal detention until payment. But this preposterous doctrine, supported only by the *obiter dictum* of Mr. Justice Eyre, in the case of *Newton v. Tring*, reported in 1 Show. 269, and the yet weaker authority of a case mentioned by Mr. Wentworth, in his *Precedents* (see *Cross on Lien*, &c. 343), has since been overruled in the recent case of *Sunbolf v. Alford*, 3 M. & W. 248. Carriers of passengers both by land and water, being liable as common carriers for the baggage of the passengers, and being bound to receive it, their right of lien on the baggage must of course be admitted. As to the liability of carriers of pas-

§ 376. The owner of a ship retaining the possession of it has a lien on the cargo for the hire, under a charter-party.¹ But it is necessary that the party so retaining should be legally in possession of the ship; for a person cannot have a lien upon the goods who has not in law the possession of them;² and this depends upon the terms of the charter-party as explained by the intention of the parties apparent therein. By the stipulations contained in some charter-parties, the owners retain such a control over the ship as to be considered in the legal possession of the ship and goods during the voyage, by means of the master and crew as their servants; and consequently, on arriving at its destination, the goods on board being in the eye of the law in their possession, they have a lien for the stipulated hire of the ship. On the other hand, there are to be found instances wherein the charter-parties have contained such apt and comprehensive words of demise that the possession has been thereby actually transferred from the owner to the charterer; in which case not having the possession, the former can exercise no right of lien over the goods. On this account it is of much importance in every case to ascertain in whom the possession is, in order to ascertain who is entitled to the lien.

§ 377. The broad principle formerly maintained that, in the case of a chartered ship, the charterer, during the existence of the charter-party, was, to all intents and purposes, the owner of the ship, and that, therefore, when goods were put on board by him in that character, the owner had no legal right to resume possession of the ship until the goods were unloaded, and had consequently no right to detain the goods, has been much narrowed and qualified by subsequent decisions.³ The common law now construes charter-parties as near as may be according to the intention of the parties, and not according to the legal sense of the terms of them. Where the ship is let for a term of years, and

sengers as common carriers of baggage, see *ante*, § 107 *et seq.*, 317 *et seq.*

¹ Abbott on Shipp. 289. Cross on Lien, &c. 300. See the judgment of Mr. Justice Richardson in *Christie v. Lewis*, 2 Brod. & B. 442; *Lane v. Penniman*, 4 Mass. 91; *Portland Bank v. Stubbs*, 6 Mass. 422.

² See Jones on Carr. 102; Saville

v. Campion, 3 B. & Ald. 503; Abbott on Shipp. 289 *et seq.*

³ Cross on Lien, &c. 301. And see *Hutton v. Bragg*, 7 Taunt. 14, since overruled; *Saville v. Campion*, 2 B. & Ald. 503; *Christie v. Lewis*, 2 Brod. & B. 410; Abbott on Shipp. 290-298.

the lessee is to appoint and pay the master and crew, and provide for the repairs, the possession passes to him.¹ But mere words denoting a demise of the ship do not necessarily preclude the conclusion that the possession of the ship has continued in the owner himself. Thus, where the owner of a ship had entered into a charter-party with a freighter, by which the former "granted and to freight let," and the latter "hired and to freight took," for a voyage out and home; it was held that, taking the whole charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner, notwithstanding the words of grant used in its commencement; and that the mere circumstance of his having entered into an agreement with the charterer as to the mode by which he should be paid for freight did not divest him of his lien on the cargo; and it made no difference that he had delivered the homeward cargo to the consignees, and received the freight due upon the bills of lading, which was different from that due on the charter-party.²

§ 378. On the other hand, although the charter-party contain no words of actual demise, there may be stipulations in it equivalent in their effect to an actual parting with the ship *pro hac vice*.³ It is, in fact, to be regretted, upon a review of all the authorities respecting the ship-owner's lien for freight, "that great uncertainty has been introduced, by their almost irreconcilable conflict, into the construction of contracts of charter-party. The maritime law, so far as it relates to the owners and masters of ships, is founded upon the principle that the master is the servant of the owner. As such servant the master is intrusted with authority over the property in his charge much more extensive than that which the lessee of a vessel for a voyage or term could have power to delegate. By the common law, also, he possesses the same authority. By the master's contract with the sub-freighters, the owner of a chartered ship is bound, — by his bottomry bond, the ship itself may be pledged to an extent much beyond the interest of the charterer; to him is intrusted the certificate of registry on which the names of the proprietors and the encumbrances on

¹ Fowler v. Kymer, 3 East, 396, cited in Abbott on Shipp. 290. And see *ante*, §§ 89, 147.

² Christie v. Lewis, 2 Brod. & B. 410.

³ Newberry v. Colvin, 1 Crompt. & J. 192, 7 Bing. 190, overruling *S. C. nom. Colvin v. Newberry*, 8 B. & C. 166. And see Abbott on Shipp. 298, 299.

their property in the ship appear, — for losses occurring through his misconduct, and that of the mariners engaged by him; the 'owners' are responsible to the extent of the value of the ship and her freight; and yet, when it becomes necessary to enforce the common-law security for that which alone makes the ship valuable to the owner, — the freight earned by her, — by dint of subtle distinctions between the contract of *locatio rei et operarum* and the contract of *locatio operis*, the possession of the master is made out not to be the possession of the owner."¹

§ 379. This highly vexed question, and so important in its consequences to the claim of lien, and the responsibilities of ownership, depending on the inquiry whether the lender or hirer under a charter-party be the owner of the ship for the voyage, it is a dry matter-of-fact question, who, by the charter-party, has the possession, command, and navigation of the ship. If the general owner retains the same, and contracts to carry a cargo on freight for the voyage, the charter-party is a mere affreightment, sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership. The general owner, in such case, is entitled to the freight, and may sue the consignee on the bills of lading in the name of the master; or he may enforce his claim by detaining the goods until payment, the law giving him a lien for freight. But when the freighter hires the possession, command, and navigation of the ship for the voyage, he becomes the owner, and is responsible for the conduct of the master and mariners; and the general owner has no lien for the freight, because he is not the carrier for the voyage. This is the principle declared and acted upon in the greatly litigated and ably discussed case of *Christie v. Lewis*.² And it is the principle declared by the Supreme Court of the United States in *Marcardier v. Chesapeake Insurance Company*,³ and *Gracie v. Palmer*.⁴ (a)

¹ Abbott on Shipp. (7th Eng. ed.) 300, 301.

² *Christie v. Lewis*, *ib. sup.*

³ *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39.

⁴ *Gracie v. Palmer*, 8 Wheat. 605. Note by Mr. Shee to Abbott on Shipp.

p. 302 (5th Am. ed.). And see the cases of the Schooner Volunteer, 1 Sumn. 550; Certain Logs of Mahogany, 2 Sumn. 589; *Ruggles v. Bucknor*, 1 Paine, 358; and other cases cited by the American editors to Abbott on Shipp. (5th Am. ed.) n. to p. 289.

(a) See Bags of Linseed, 1 Black, 108; *Campbell v. Perkins*, 4 Seld. 430. In *Foster v. Colby*, 3 H. & N. 704, 715, the court, per Pollock, C. B., held

§ 380. Although the exercise of the ship-owner's right of lien may be upheld in cases of doubtful construction, an express contract is the most sure ground upon which that right can rest.¹ He may reserve that right to himself by a full and unequivocal declaration of intention in the charter-party, that he shall retain the right of lien upon the lading of the vessel. This express contract amounts, in fact, to a covenant on the part of the charterer, that, whatever may be the legal operation of the charter-party, as between themselves, the charterer's possession of the ship shall be the possession of the owner, so far as the right of the latter on the cargo is in any way concerned.² And if such lien be expressly reserved by a charter-party, it attaches on the goods, though assigned by the charterer previous to their conveyance. Thus, where it appeared that the owner of a ship had made such reservation, and the charterer had purchased the goods and put them on board, and subsequently transferred them, with a stipulation that they should be conveyed to their destination, it was held that even against an indorsee of the lading, they were subject not only to that particular freight, but to the ship-owner's lien for a balance due to him under the charter-party, whether possession of the ship was, by the charter-party, completely out of the ship-owner, and vested in the charterer, or not.³ (a)

§ 381. No lien exists by virtue of unliquidated damages. Where the freighter of a ship, for instance, covenanted that, if she should not be fully laden, he would not only pay for the goods on board, but for so much also in addition, as the ship would have carried, for which he had before stipulated to pay freight according to the different rates for three descriptions of goods; it was held, that the ship-owner had no lien upon the goods actually on board for the amount of dead freight; in other words, for the

¹ Abbott, &c. *supra*.

² Cross on Lien, 306.

³ Small v. Moates, 9 Bing. 579, cited in Abbott, &c., *supra*.

that "a *bond fide* indorsee for value of the bill of lading, having no knowledge or notice of the charter-party, or that the cargo was subject to lien for any freight except that mentioned in the bill of lading, and not acting collusively, is entitled to the goods on payment of the freight stipulated for in the bill of lading, and is not affected by the greater liability of the indorser, supposing such liability to exist." See also *Gilkison v. Middleton*, 2 C. B. (N. S.) 134.

(a) See *Kern v. Deslandes*, 10 C. B. (N. S.) 205; *The Salem's Cargo*, 1 Sprague, 389.

compensation in damages, which he was entitled to for the freighter's breach of contract in not putting a full loading on board, which damages were unliquidated.¹(a)

§ 382. In replevin for tobacco, it appeared, that an agreement was entered into between A. M. and H. G. to execute a charter-party for a vessel, the defendant, captain, from B. to A., but which charter-party was not executed. That H. G. put the tobacco on board the vessel, and afterwards sold it to the plaintiff, and gave an order for it on the defendant, who refused to deliver it, but insisted that the cargo should be completed, and that the vessel should proceed to perform the voyage, and that the freight should be paid, which H. G. and the plaintiff refused to do. It was held, that the defendant had no lien on the tobacco for freight, no freight being in fact due before the commencement of the voyage; and that, if an injury had been sustained by the owner of the vessel, in consequence of the violation of the contract on the part of H. G., the proper remedy was to be sought by an action against him for the unliquidated damage.²(b)

§ 383. Nor will a mutual obligation in a penal sum on the parties, the ship, the tackle, or the merchandise consigned, alter the rights of the owner in this respect, so as to entitle him to a right of lien on breach of the covenants contained therein. The lien at common law exists only in respect of freight actually earned by the arrival of the goods at the stipulated place of destination. Covenants, therefore, for demurrage, (c) or for providing a full cargo, cannot be enforced by the specific remedy of lien, though the charter-party contain such penal clause. The remedy

¹ Phillips v. Rodie, 15 East, 546, ² Burgess v. Gun, 3 Harris & J. and cited in Abbott on Shipp. 286, 225. and Cross on Lien, &c. 307.

(a) In Kerford v. Mondel, 5 H. & N. 931, the charter-party provided that the master might sign bills of lading without prejudice to the charter-party, and that there should be a lien for dead freight on goods to be laden on board. The master signed bills of lading by the terms of which the goods were deliverable "on payment of freight and carriage as agreed." Held, that there was no lien on the goods for dead freight. See also Pearson v. Göschel, 17 C. B. (N. S.) 352; Fry v. Chartered Bank of India, L. R. 1 C. P. 689; Gray v. Carr, L. R. 6 Q. B. 522.

(b) See *post*, § 393.

(c) See Crommelin v. New York R. 10 Bosw. 77.

for such matters rests entirely in covenant, and the mere penal clause will not extend the right of lien. If it be the intention to create such right, it must be by express provision, that the ship-owners shall have a right to detain the goods which shall be brought home, until all their demands under the covenants are satisfied; inasmuch as a lien may be extended or wholly excluded by particular contract.¹ (a)

§ 384. Lien attaches, whether payment of freight is to precede or be concomitant with delivery of the cargo. By stipulations in bills of lading that the goods shall be delivered to the consignees, they paying the freight, the delivery of the cargo and the payment of freight are concomitant acts, which neither party is obliged to perform, without the other being ready to perform the correlative act. (b) Where the owner of the vessel covenanted to deliver the cargo agreeably to bills of lading, and the freighters covenanted to pay one third of the freight in cash on arrival, and the remainder on delivery of the cargo, by good bills of exchange at four months' date; and the captain landed the goods in his own name, and offered them to the freighter at one delivery, on

¹ In the case of *Birley v. Gladstone*, an entire ship was chartered for a voyage out and home, and by the terms of the charter-party, the merchant covenanted to pay for the homeward cargo at certain rates per ton, on delivery of the cargo at Liverpool, by bills at three months; to load a full cargo and to pay demurrage, and he bound the goods to the performance of his covenants. The Court of King's Bench decided, that the owner could not detain the goods, either for the freight of such as were put on board but afterwards relanded by compulsion, or for dead freight, or for demurrage. A bill was afterwards filed in Chancery, for the purpose of obtaining a declaration, that the ship-owners were entitled to a lien in equity; but the Master of the Rolls, Sir William Grant, dismissed the bill; and in the

course of his judgment he said: "There can be but one right construction of the clause; and if it could be said that the Court of King's Bench had ill-construed it, this is not a court of appeal in which their decision can be corrected. It was asked, what effect the clause could have, if it gave no lien either in law or equity? A court of equity is not bound to find an equitable effect for a clause, merely because the construction which a court of law has put upon it would leave it inoperative. In truth, it has been copied from foreign charter-parties, with very little consideration of the effect that might be allowed to it in the law of this country." *Birley v. Gladstone*, 3 Maule & S. 205, and 2 Mer. Ch. 401. And see Cross on Lien, &c. 307, and Abbott on Shipp. 286.

(a) *McLean v. Fleming*, L. R. 2 H. L. Sc. 128.

(b) *Adams v. Clark*, 9 Cush. 215.

receiving the stipulated freight; it was held, that the owner had a lien on them until such bills were produced by the freighter.¹

§ 385. Notwithstanding, therefore, the opinion which seems to have been formerly entertained,² that wherever there was a special contract between the parties, no lien could exist, the doctrine does not now prevail.³ It was examined with great care by the court (as it involved the consideration of several ancient authorities) in the case of *Chase v. Westmore*,⁴ and in the judgment delivered, after advisement, by Lord Ellenborough, was repudiated, and expressly declared to be contrary to reason and the established principles of law. In *Pinney v. Wells*, in Connecticut,⁵ the court declare, that the rule may now be considered as settled, that a lien may exist, although there is a special contract.

§ 386. The existence, therefore, of a special contract between a common carrier and his employer, regarding the services to be performed, and the compensation to be paid, does not deprive the former of his lien, unless there is something in that contract inconsistent with such lien. In other words, no claim to the possession of goods can be set up which conflicts with the terms of the contract. (a) Credit given, by the contract, to the employer for the

¹ *Yates v. Mennell*, 2 Moore, 297. And see *Tate v. Meek*, 2 Moore, 278; *Yates v. Railston*, 8 Taunt. 293; *Abbott on Shipp.* 293, 294.

² See opinion of Williams, J., in *Pinney v. Wells*, 10 Conn. 104, and opinion of Lord Ellenborough in *Chase v. Westmore*, 5 Maule & S. 180.

³ *Ibid.*, and note to Metcalf's ed. of *Yelv.* 67 a.

⁴ *Chase v. Westmore*, *ub. sup.*

⁵ *Pinney v. Wells*, *ub. sup.* By the old authorities, says Kent, no lien existed in cases of special contract for the price, but those authorities have been overruled as contrary to reason and the principles of law; and it is now settled that it exists equally, whether there be, or be not, an agreement for the price. 2 Kent, Com. 634.

(a) In *The Kimball*, 3 Wall. 37, the vessel was chartered for a round voyage from New York to Melbourne, Calcutta, and Boston. A part of the charter money was paid in advance, the balance was "payable, one half in five, and one half in ten days, after discharge of homeward cargo." While the vessel was at sea the charterer, at the request of the owner, gave him his notes for ten thousand dollars, drawn so as to be payable near the time when it was expected the vessel would arrive. They were given for the accommodation of the owner, and were to be held over or renewed in case they fell due before the vessel reached home. The vessel arrived about five weeks before the notes fell due. *Held*, that there was no waiver of the lien of the owner.

price of transportation, beyond the time when the goods transported are to be delivered and placed out of the carrier's control, is inconsistent with a lien.¹ Lord Ellenborough declared a lien to be wholly inconsistent with a dealing on credit, and maintained that it could only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed.²

§ 387. In *Chandler v. Belden*, in New York,³ the defendant agreed to transport salt from Turks Island to New York, and by the terms of the contract five hundred dollars were to be paid in advance, and the balance in three equal payments at thirty, sixty, and ninety days after its arrival in New York. The five hundred dollars having been paid, the defendant claimed a lien for the balance of the freight. But the court denied that a lien existed, and held, that it could not be enforced, where the parties had expressly regulated the time and manner of paying freight, by stipulation in a charter-party; especially, if the cargo is to be delivered before the period of payment arrives; Spencer, J., saying that such an agreement was an express renunciation of the right to insist on freight before the cargo was delivered.

§ 388. In *Pinney v. Wells*, before referred to,⁴ A, a manufacturer, and B, a common carrier, entered into a contract, in May, 1833, wherein it was stipulated, that B should transport

¹ 2 Kent, Com. 634.

² *Raitt v. Mitchell*, 4 Camp. 149. Where a solicitor took the notes of an executor of his employer, payable in three years, it was *held*, that, by necessary implication, he agreed to give up the papers and rely upon the security; and the Lord Chancellor said, that if a lien commenced under an implied contract, and afterwards

a special contract was made for payment, in the nature of the thing, one contract destroys the other. *Cowell v. Simpson*, 16 Ves. 275. The same principle is recognized in *Crawshay v. Homfray*, 4 B. & Ald. 50.

³ *Chandler v. Belden*, 18 Johns. 157.

⁴ *Pinney v. Wells*, 10 Conn. 104.

See *Tamvaco v. Simpson*, L. R. 1 C. P. 363; *Paynter v. James*, L. R. 2 C. P. 348.

In *Kirchner v. Venus*, 12 Moore, P. C. 361 (affirming *How v. Kirchner*, 11 Moore, P. C. 21, and dissenting from *Gilkison v. Middleton*, 2 C. B. (N. S.) 134, and *Neish v. Graham*, 8 Ellis & B. 505), it was *held* that an agreement by the bill of lading that freight should be payable in Liverpool one month after the vessel should sail from there on a voyage for Sidney, "vessel lost or not lost," took away from the master the right to retain the goods on arrival at Sidney for the unpaid freight. See also *The Bird of Paradise*, 5 Wall. 545.

1,500 tons of coal belonging to A from Philadelphia, and deliver it at Collinsville, in Connecticut; that A should pay B for this transportation \$4.37½ cents per ton; that A should have the privilege of giving his notes payable at the Hartford Bank, instead of paying the cash; that all the notes so given previous to the 1st of August, 1833, to be payable in four months, and all given after that time to be payable in three months from the dates thereof. Whereupon B immediately commenced the transportation of the coal under the contract, and before the 10th of September, 1833, had transported from Philadelphia to New Haven 1,276 tons, of which he had transported 753 tons from New Haven to Avon, and 623 tons from Avon to Collinsville, when A failed, and made a general assignment of his property, including the coal at New Haven and Avon, in a course of transportation, in the possession of B; A at different times, between the 28th of June, 1833, gave B his notes pursuant to the contract, to the amount of \$3,450, which were outstanding at the time of A's failure, and remained unpaid. It was held, that this was substantially a contract upon which B gave A credit, and thereby B waived the benefit of a lien on the coal in his possession, either for the transportation of the whole or the parcels not delivered. It seemed to Williams, J. (in whose opinion all the judges present concurred), apparent, under the circumstances of the case, that the contract in question was utterly inconsistent with a lien in the carrier; and he remarked, that "if, by the contract originally made, they (the carriers) waived any claim for freight, and instead of leaving their payment to the implication of law, they contracted to give a credit for the freight, then, whether they had parted with the possession or retained it, they must look only to the contract they had entered into for their security."

§ 389. It may distinctly appear, by the terms of a charter-party, that the owner of the ship has been content to trust to the personal responsibility of the merchant, and by fixing a specific time of payment, before or after delivery, to waive his right of lien.¹

§ 390. The principle above considered has likewise been extended to cases where there was no express agreement to give

¹ Lucas v. Nockells, 4 Bing. 729.

credit, but where, by the usage of trade, a credit might be claimed; as where a ship was taken to a dock to repair, and great expenses were incurred by the shipwright; it being proved, that, by usage, the owner of the ship might demand a credit, it was held there was no lien.¹ And again, where goods were landed upon a wharf in October, and by usage, wharfage was not payable until Christmas, it was held there could be no lien.²

§ 391. *Secondly*, as to the right of the carrier to the recovery of his hire after the possession of the goods has been relinquished. He is compelled, in such event, to resort to an action at law to recover compensation for his service; and the compensation, when thus claimed by a carrier by water, has obtained the appellation of "Freight."³ This term, in its most extensive sense, is applied to all rewards or compensation paid for the use of ships, including the transportation of passengers;⁴ (a) but, in the common acceptation of the term, it means the price for the actual transportation of goods by sea from one place to another.⁵ Foreign writers consider passage-money the same as freight; and as Lord Ellenborough has affirmed, except for the purposes of lien, it seems the same thing.⁶

¹ *Raitt v. Mitchell*, 4 Camp. 146.

² *Crawshay v. Homfray*, 4 B. & Ald. 50.

³ *Beawes*, Lex Merc. 118. *Abbott on Shipp.* 405. 3 Kent, Com. 219. Freight, in the general legal sense of the term, means all rewards, hire, or compensation, paid for the use of ships. *Pothier, Traité de Chartre-Partie*, n. 1. See note 1 to *Abbott, supra*.

⁴ *Giles v. The Cynthia*, 1 Pet. Adm. 206.

⁵ 3 Kent, Com. 218, and *Pothier, supra*.

⁶ *Mulloy v. Backer*, 5 East, 321. Upon this resemblance the following case arose: The plaintiff agreed to convey the defendant, his family and luggage, from Demerara to Flushing. In the course of the voyage his vessel was taken by an English brig and brought into Plymouth. The defend-

ant and his family were set at liberty, and their luggage restored. And the action was brought to recover the passage-money for so much of the journey as was performed at the time of the interruption; upon the principle, that the defendant had accepted his own liberation, and his luggage, at Plymouth, and did not require the plaintiff to carry him on to the end of his journey, which, it was contended, was a sufficient foundation for a promise to be implied. The vessel and cargo had been libelled in the Court of Admiralty for condemnation, but no decision as to the vessel, which was claimed by a British subject as his property, had taken place at the commencement of the suit. Upon which fact, the case was ultimately decided. The action which presumed the freight *pro rata* to be in the plaintiff, was held to have been prematurely

(a) *Brown v. Harris*, 2 Gray, 359.

§ 392. The amount of freight is most usually fixed by agreement between the parties; but when there is no agreement for the price of conveyance, the carrier may recover his reward on a *quantum meruit*; ¹ (a) the amount to be ascertained by the usage of trade, and the circumstances and reason of the case.² But, in respect to the usage, when relied on, and sought to be established, it must be shown to be a generally recognized usage, and must

brought "pending the discussion of these rights in a court which has not only competent, but exclusive, jurisdiction of the question of prize, and which has power to deal with the freight as it thinks proper. Pending the suit in the Admiralty, no person had a right to restore the passenger's luggage, which in strictness was as much subject to the question of prize as the ship and cargo; and the mere restoration of it, *de facto*, by an unauthorized hand, cannot affect the right of the captors pending the suit." *Mulloy v. Backer*, *ub. sup.* In this case, the action was brought pending the proceedings in the Court of Admiralty, and upon that ground was decided against the master, because

possibly the Court of Admiralty might order the defendant to pay to the captors. That passage-money and freight are governed by the same rules as between the passenger or freighter, and the ship-owner and master, see *Moffat v. East India Co.* 10 East, 468; *Watson v. Duykinck*, 3 Johns. 335; *Howland v. The Lavinia*, 1 Pet. Adm. 126; *Griggs v. Austin*, 3 Pick. 20.

¹ *Bastard v. Bastard*, 2 Show. 81. And see on this subject more fully, *ante*, §§ 124, 356.

² 3 Kent, Com. 219. If goods be sent on board a vessel generally, the freight must be according to that commonly paid for the like accustomed voyages. *Beawes*, *Lex Merc.* 190.

(a) In *Smidt v. Tilden*, L. R. 9 Q. B. 446, the master of a ship made a charter-party with A, by which he agreed to carry a certain amount of iron from one port to another, freight to be paid on signing the bills of lading, and the master to have an absolute lien for freight. The next day A chartered the ship to the defendant to do the same thing. Neither the plaintiff nor the defendant knew of the charter of the other, and A had no authority to act for the ship. The cargo was carried and delivered to the defendant under a bill of lading making it deliverable to consignees or assigns, "they paying freight for the said goods as per charter-party." The defendant paid the freight agreed to A. *Held*, that the plaintiff could not maintain an action against the defendant for the freight. In *Mercantile Bank v. Gladstone*, L. R. 3 Ex. 233, A requested the defendant to buy cotton for him in Calcutta, to be shipped on a vessel belonging to A, and consented that it should be shipped at a nominal rate of freight. The cotton was bought and shipped, the master signing a bill of lading to the defendant's order, "freight free on owner's account." Before it was shipped A had sold the vessel to the plaintiff, but this was not known to the master. Before the cotton was delivered A stopped payment, and the defendant stopped the goods *in transitu*. The plaintiff took possession of the ship and claimed freight, but it was *held* that the defendant was not liable for freight. See *Weguelin v. Cellier*, L. R. 6 H. L. 286.

not merely exist in the judgment and opinion of witnesses.¹ In a case where two witnesses stated that the usual practice of the trade to Sydney was to consider steerage passengers as "cargo," and their passage-money as "freight"; but could give no instances of such construction within their own knowledge; it was held that the evidence was insufficient to establish an usage of trade so as to vary the *prima facie* meaning of the words "cargo" and "freight" in a written contract.²

§ 393. Of course, to entitle a common carrier to recover for freight, it must appear that the property was not transported against the express orders of the owner; nor will a receipt of the property by the owner alter the case.³ If there be an earnest given, and a verbal agreement only for freight, and the same be broken off by the merchant, according to the Rhodian law, he loses his earnest; but if the owners or master repent, they forfeit double.⁴ But by the common law the party damnified may bring his action on the case and recover all damages on the agreement. A contracted with B for the carriage of 100 quarters of barley, and promised to deliver unto him the said 100 quarters at Barton Haven, to carry them for him, and for the carriage thereof did promise to pay him so much; and B promised to carry the same for him, and accordingly brought his ship to the said haven, expecting there the delivery of the 100 quarters of barley; but A came not to deliver the same to him. Whereupon B brought his action of assumpsit for the freight, and upon the general issue pleaded had a verdict and judgment, which was affirmed upon a writ of error.⁵ If goods are put on board a vessel in pursuance of an agreement to execute a charter-party, and while on board they are sold, and the purchaser refuses to pay the freight, the proper remedy by the owner of the vessel for the injury sustained by him, in consequence of the violation of the contract, is by an action. No freight being due on the cargo before the commencement of the voyage, there exists no right of lien.⁶ (a)

¹ *Ante*, § 358.

⁴ Beawes, *Lex Merc.* 190, cited in

² *Lewis v. Marshall*, 7 Man. & G. 729. Jones on Carr. 138.

⁵ *Atkinson v. Buckle*, 3 Bulstr.

³ *Schureman v. Withers, Anthon*, 152, and cited in Jones on Carr. 139. N. P. 166.

⁶ *Burgess v. Gun*, 3 Harris & J. 225.

(a) It is *held*, in some cases, that the lien of a vessel for freight commences as soon as the goods are received on a contract of carriage. *Tindal v. Taylor*,

§ 394. With respect to living animals, whether men or cattle, which may die during the voyage, without any fault or neglect of the persons on board the ship, if there be no express agreement whether the freight is to be paid for the lading or for the transporting of them, freight is to be paid as well for the dead as the living. If the agreement be to pay freight for the lading them, their death cannot deprive the owners of the freight. If the agreement be to pay freight for transporting them, then no freight is due for those that die on the voyage, because, as to them, the contract is not performed. These distinctions are found in the civil law, and are adopted by all the writers on this subject.¹ They have been laid down by Beawes as being acknowledged positions in maritime law,² of which Lord Mansfield has said,³ that it is the general law of nations, *Non erit alia lex Romæ, alia Athenis; alia nunc, alia post hac; sed apud omnes gentes, et omni tempore una eademque lex obtinebit.*⁴

¹ Abbott on Shipp. 409, 410, who cites Dig. 14, 2, 10. Roccus, not. 76-78. Molloy, B. 2, ch. 4. And so laid down in 3 Kent, Com. 225, 226.

² Beawes, Lex Merc.

³ Luke v. Lyde, 2 Burr. 887.

⁴ And see also Jones on Carr. 139. Live animals and the freight of them are not protected by a policy of insurance in general terms upon "cargo" and "freight," but are the subjects of a particular insurance. Wolcott v. Eagle Ins. Co. 4 Pick. 429. It should seem reasonable that parties, in insurance upon living animals, should make a particular agreement as to the extent of the risk to be borne. For it is not to be supposed that the premium for insuring a cargo of race-horses, elephants, or other valuable animals would not be greater than

for insuring bales of goods. In the former case, the animals would be exposed not only to natural death, but to destruction by the breaking of their limbs from the rolling of the ship; which would not occasion the least injury to the bales of merchandise. And the freight upon animals is estimated, sometimes upon the number laden on board, and sometimes upon the number delivered alive, but not upon such as die upon the passage; unless there should be a particular agreement. Per Putnam, J., in delivering the opinion of the court in Wolcott v. Eagle Ins. Co., *supra*. In an action on a charter-party, £14 was to be paid in England for each passenger ordered on board the ship, and not for each passenger who should be brought to England;

4 Ellis & B. 219; 28 Eng. L. & Eq. 210. Keyser v. Harbeck, 3 Duer, 373. Thompson v. Small, 1 C. B. 328, 354. Thompson v. Trail, 2 Car. & P. 334. Bartlett v. Carnley, 6 Duer, 194. And see *ante*, § 368. In Bailey v. Damon, 3 Gray, 92, it is held that the lien for freight does not commence until the ship breaks ground on her voyage. See also Curling v. Long, 1 Bos. & P. 634; Clemson v. Davidson, 5 Binn. 392, 401; Burgess v. Gun, 3 Harris & J. 225; Blossom v. Champion, 37 Barb. 554.

§ 395. Freight may be due in respect of charter-party. These instruments, as has already been shown (although they sometimes contain an actual demise of the ship from the owners to the freighters), are often so framed that the legal possession of the ship shall remain in the owner, and a mere right of lading the vessel shall be acquired by the freighter. A charter-party of this kind differs from a bill of lading only in extending to all the goods on board; and a ship so chartered only in this, that the owner contracts to carry only for one person instead of several; and in such case the owner is to be considered as the carrier of the goods, and is subject to the liabilities attaching on persons using that trade.¹

§ 396. The right of recovery of freight, according to the contract for that purpose in the charter-party, of course depends upon the terms in which the contract is expressed. These are so numerous and so varied in proportion to the different degrees of confidence mutually reposed in each other by the parties thereto, that the many decisions which are to be found in the books, arising upon contracts for freight, constitute a large portion of the law of shipping.² To point them all out would far extend the limits, and exceed the design of the present work. The general rule which courts have adopted with regard to the construction of charter-parties, as well as other mercantile instruments, is, that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and the particular trade to which the contract relates.³

§ 397. It is often provided in charter-parties, that the goods shall be delivered agreeably to bills of lading to be signed by the

and it was meant to be a compensation for providing diet and accommodation for the passengers, which expense would, at all events, be incurred whether the ship arrived or was lost. *Per Le Blanc, J., in Moffat v. East India Co.* 10 East, 468.

¹ Jones on Carr. 120. 4 Com. Dig. 231, and tit. Merchant, E. 8. *Saville v. Campion*, 2 B. & Ald. 507. *Christie v. Lewis*, 2 Brod. & B. 427. *Beawes*, Lex Merc. And see *ante*, §§ 88, 89.

² See Abbott on Shipp. Pt. 4, ch.

1, entitled "Contract of Affreightment by Charter-party;" Abbott on Shipp. Pt. 4, ch. 9, entitled "Of Payment of Freight;" 3 Kent, Com. Lect. 47. A person who charters a vessel does not become owner for the trip, when, by the terms of the charter-party, he pays a gross sum, the general owner furnishing the master and crew, and defraying the expenses of the vessel. *Schooner Argyle v. Worthington*, 17 Ohio, 460.

³ Abbott on Shipp. 250.

master; and the master, upon receiving the goods, signs bills of lading for delivery on payment of freight, or with words of similar import, giving him a right to refuse to make delivery to the person designated by the bill of lading, without payment of freight. And, as it has sometimes happened, that the master has not insisted upon the exercise of this right, it has been much questioned whether the merchant-charterer was answerable for the freight; and it has been decided that he is answerable.¹ (a) A., a common carrier, received goods at Philadelphia for C. & T. at Lexington, and receipted for the same, to be delivered to H. & L. of Pittsburg, "on presenting this receipt and payment of freight." The goods were delivered, but the freight was not paid, and H. & L. received the amount of the freight from C. & T., and afterwards failed. It was held that A. was entitled to recover the amount of the freight from C. & T.² The court in this case considered the point before them had long been settled. It was fully discussed in *Shepard v. De Bernales*,³ and ruled, upon the authority of *Penrose v. Wilks*,⁴ *Tapley v. Martin*,⁵ and *Christy v. Rowe*,⁶ that the stipulation in a bill of lading, for delivery on payment of freight is introduced for the benefit of the consignor, or the party for whom the consignee is agent. If the agent should be faithless, the loss would fall on those who trusted him, and they ought to bear it, and this is a point conclusively established.⁷ (b)

¹ Abbott on Shipp. 414 *et seq.* And see 3 Kent, Com. 222; *Spencer v. White*, 1 Ired. 236; *Layng v. Stewart*, 1 Watts & S. 222; *Barker v. Havens*, 17 Johns. 234.

² *Collins v. Union Trans. Co.* 10 Watts, 384.

³ *Shepard v. De Bernales*, 13 East, 567.

⁴ *Penrose v. Wilks*, Abbott on Shipp. 415.

⁵ *Tapley v. Martin*, 8 T. R. 445.

⁶ *Christy v. Rowe*, 1 Taunt. 300.

⁷ *Collins v. Union Trans. Co.* 10 Watts, 384.

(a) If the consignor is owner of the goods he is unquestionably liable for the freight. *Holt v. Westcott*, 43 Maine, 445. And he is now considered as liable for the freight, although he does not own the goods, and the carrier has waived his lien thereon. *Wooster v. Tarr*, 8 Allen, 270. See *Jobbitt v. Goundry*, 29 Barb. 509; *Fox v. Nott*, 6 H. & N. 630.

In *Thomas v. Snyder*, 39 Penn. State, 317, coal was shipped to D or his assigns, "he or they paying freight" unto A, the owner of the boat. When the coal was delivered, neither A nor any agent of his was present to receive the freight, and by the subsequent failure of the assignees it was lost. *Held*, on these facts, that the consignor was not liable for the freight.

(b) If the consignee or indorsee of a bill of lading, containing the clause

§ 398. A bill of lading is called by Lord Loughborough¹ the written evidence of a contract for the carriage and delivery of goods sent by sea, for a certain freight. Its peculiarity is, that unless freight is wholly earned, by a strict performance of the voyage, no freight is due or recoverable. The contract of the

¹ *Mason v. Lickbarrow*, 1 H. Bl. 359, and see *ante*, § 223.

making the goods deliverable to him on payment of freight, accepts the consignment, there is either a legal presumption that he contracted to pay the freight; *Scaife v. Tobin*, 3 B. & Ad. 523; *Dougal v. Kemble*, 3 Bing. 383; *Cock v. Taylor*, 13 East, 399; *Jesson v. Solly*, 4 Taunt. 53; or evidence from which the jury would be warranted in finding a contract by the consignee to pay the freight. *Sanders v. Vanzeller*, 4 Q. B. 260; *Kemp v. Clark*, 12 Q. B. 647; *Zwilchenbart v. Henderson*, 9 Exch. 722; 25 Eng. L. & Eq. 560; *Möller v. Young*, 5 Ellis & B. 755; 34 Eng. L. & Eq. 92; reversing *S. C.* in Q. B. 5 Ellis & B. 7; 30 Eng. L. & Eq. 345. See *Allen v. Bareda*, 7 Bosw. 204; *The Schooner Treasurer*, 1 Sprague, 473; *Swett v. Black*, 2 Sprague, 49. In *Weguelin v. Cellier*, L. R. 6 H. L. 286, the bill of lading made the goods deliverable to the order of the consignees, and contained the words "freight for said goods, £4 5s. per ton of 20 cwt. net, delivered, with primage and average accustomed," &c. *Held*, that these words were equivalent to the usual clause, "he or they paying freight." If goods are consigned to A for B, A does not become liable for freight on receiving the goods. *Amos v. Temperley*, 8 M. & W. 798. See also *Grove v. Brien*, 8 How. 429; *Miner v. Norwich R.* 32 Conn. 91. *Contra*, *Canfield v. Northern R.* 18 Barb. 586. And see *Hinsdell v. Weed*, 5 Denio, 172.

The liability of the consignee ceases on his indorsing the bill of lading, before delivery of the goods to him. *Cock v. Taylor*, 13 East, 399. *Tobin v. Crawford*, 5 M. & W. 235; 9 M. & W. 716. *Dougal v. Kemble*, 3 Bing. 383. *Trask v. Duvall*, 4 Wash. C. C. 181. *Meriam v. Funck*, 4 Denio, 110; affirmed 1 How. Ct. App. 656. And the rule is the same, although the goods are put into the public store, under a general order to discharge the ship, before the indorsement of the bill of lading. *Ibid.* *New York Nav. Co. v. Young*, 3 E. D. Smith, 187. If an intermediate consignee is in any event liable for freight, he has the right to deduct from the freight due the amount of any damage previously done to the goods. *Davis v. Pattison*, 24 N. Y. 317.

The Bills of Lading Act of 18 & 19 Vict. c. 111, provides that every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself. Under this act it has been *held*, that the rights and liabilities of the consignee or indorsee pass from him by indorsement over to a third person. *Smurthwaite v. Wilkins*, 11 C. B. (N. S.) 812. See also *Lewis v. M'Kee*, L. R. 2 Ex. 37; L. R. 4 Ex. 58.

ship-carrier is indivisible, and he can recover for no portion of the voyage that has been made until the whole is finished, and the goods have reached their destination; unless the consignees, by a new contract, accept them short of the place of destination. The contract for the conveyance of merchandise by a bill of lading is, says Lord Tenterden, "an entire contract, and unless it be completely performed by the delivery of the goods at the place of destination, the merchant will in general derive no benefit from the time and labor expended in a partial conveyance, and consequently be subject to no payment whatever; although the ship may have been hired by the month or week."¹ The doctrine has never been controverted, and is expressly asserted by Mr. Justice Story.² (a)

¹ Abbott on Shipp. 491. The same doctrine is laid down by Holt, Law of Shipp. 134; 3 Kent, Com. 219. ren Ins. Co. 1 Story, 352; Saltus v. Ocean Ins. Co. 14 Johns. 138; Griswold v. New York Ins. Co. 3 Johns.

² The Ship Nathaniel Hooper, 3 Sumn. 542. See also Jordan v. War- 321; Caze v. Baltimore Ins. Co. 7 Cranch, 358.

(a) The general rule is, that the contract of the carrier is indivisible, and he can recover no freight unless all the goods are delivered; and therefore where a contract was made to carry for a gross sum a variety of miscellaneous articles, unlike in kind, quality, and value, and bearing no definite proportion to each other in size or in cost of transportation, and part were lost by the fault of the carrier, it was held that the consignor was not liable for freight for any part. Sayward v. Stevens, 3 Gray, 97. See Blanchet v. Powell's Collieries Co. L. R. 9 Ex. 74. But where freight is payable by the ton, by admeasurements, by the package, or barrel, or where different portions of the same cargo are shipped upon distinct and separate terms as to freight, freight must be paid for what is delivered. Ritchie v. Atkinson, 10 East, 295. Christy v. Row, 1 Taunt. 300. The Brig Collenberg, 1 Black, 170. If part is accepted; freight is due for that part. Hinsdell v. Weed, 5 Denio, 172. If part is delivered and accepted, and the value of the rest is paid, freight for the whole is due. Hammond v. McClures, 1 Bay, 101. Hill v. Leadbetter, 42 Maine, 372. But this rule does not apply, unless the part is accepted, although the lost goods can be easily supplied at the place of delivery, and although the carrier is authorized by the terms of the contract to sell the goods for non-payment of freight, if not received by the consignee within a certain time, and he does sell them and makes up the deficiency to the purchaser. Sayward v. Stevens, 3 Gray, 97. And in such a case, if the owner brings an action for money had and received to recover the proceeds of the sale, freight cannot be deducted, but all expenses of the sale may be, and if the carrier in good faith makes up the deficiency to the purchaser he may deduct this also. Stevens v. Sayward, 3 Gray, 108; 8 Gray, 215. If goods increase in bulk on the way, freight is due only on the amount shipped. Gibson v. Sturge, 10

§ 399. As freight is the payment made for the conveyance of merchandise to its destination, it denotes the price of carriage and not of receiving goods to be carried; and hence, though a merchant may contract to pay a sum of money to a ship-owner for taking goods on board, yet such payment is not, strictly speaking, freight. (a) It is thus, that no freight becomes due

Exch. 622; 29 Eng. L. & Eq. 460. In *Tully v. Terry*, L. R. 8 C. P. 679, grain was shipped under a charter-party at a certain rate per quarter delivered, and if any portion should be delivered in a heated condition, freight should be payable "on the invoice quantity taken on board as per bill of lading, or half freight upon the heated portion, at the captain's option." The master signed a bill of lading by which freight was payable as per charter-party, and the following words were written on the bill of lading: "Quantity and quality unknown." Part of the cargo was delivered in a heated condition, and the master claimed freight on the invoice quantity taken on board. *Held*, that he was entitled to be so paid, notwithstanding the memorandum as to weight. If freight is payable per "net weight delivered," the ship-owner is only entitled to freight on the amount delivered. *Coulthurst v. Sweet*, L. R. 1 C. P. 649. In *Buckle v. Knoop*, L. R. 2 Ex. 125, the freight by the charter was "seventy-five shillings per ton of fifty cubic feet delivered." Cotton which had been pressed expanded on being taken out of the hold. *Held*, that freight was due on the amount shipped. This case was affirmed in the Exchequer Chamber, L. R. 2 Ex. 333. The fact that the master has receipted for more than he delivers does not entitle him to freight for any more than he delivers. *Allen v. Bates*, 1 Hilton, 221.

(a) This principle has an important bearing on the case of freight or passage-money paid in advance, where the general rule is, that freight paid in advance is not earned, unless the voyage for which it is stipulated to be paid is fully performed, and the carrier is liable to a claim for reimbursement, if for any fault not imputable to the bailor the contract is not fulfilled. *Minturn v. Warren Ins. Co.* 2 Allen, 86. *Benner v. Equitable Safety Ins. Co.* 6 Allen, 222. *Chase v. Alliance Ins. Co.* 9 Allen, 311. *Manfield v. Maitland*, 4 B. & Ald. 582. *Pitman v. Hooper*, 3 Sumn. 66. *Watson v. Duykinck*, 3 Johns. 335. *Brown v. Harris*, 2 Gray, 359. *Cope v. Dodd*, 13 Penn. State, 33. *Lawson v. Worms*, 6 Calif. 365. If the non-fulfilment of the contract is caused by the fault of the bailor, freight cannot be recovered back. *Giles v. Brig Cynthia*, 1 Pet. Adm. 207, n. *Griggs v. Austin*, 3 Pick. 20. *Detouches v. Peck*, 9 Johns. 210. This general rule may be varied or annulled by an express agreement that the money paid in advance on account of freight shall be deemed to be absolutely due to the carrier at the time of its prepayment, and not in any degree dependent on the contingency of the performance and entire fulfilment of the contract of carriage. *De Silvale v. Kendall*, 4 Maule & S. 37. *Jackson v. Isaacs*, 3 H. & N. 405. *Hicks v. Shield*, 7 Ellis & B. 633. *Kinsman v. New York Ins. Co.* 5 Bosw. 460. Such a stipulation should be expressed in terms so clear and unambiguous as to leave no doubt that such

until the voyage is completely performed ; and in consequence of this rule, when a ship has been engaged to sail from one port to another, as from A to B, and back again, it may become important to know whether this employment is to be looked upon as consisting of one or two distinct voyages. The question is one in the solving of which courts are guided by the intention of the parties as collected from the words and subject-matter of their agreement.¹ (a)

§ 400. To perfect the right to freight it is not only necessary that the goods arrive at the place of destination, but there must be a delivery of them.² (b) But although no action will lie for

¹ Smith, Merc. Law, 299. Blakely 13 Mass. 75. Coffin v. Storer, 5 Mass. v. Dickson, 2 Bos. & P. 321. Andrew 252. Cheroit v. Barker, 2 Johns. 346. v. Moorhouse, 5 Taunt. 435. Mash- Penoyer v. Hallet, 15 Johns. 332. iter v. Buller, 1 Camp. 84. Crozier v. Blanchard v. Bucknam, 3 Greenl. 1. Smith, 1 Man. & G. 407. Abbott on ² Lane v. Penniman, 4 Mass. 91. Shipp. Pt. 3, ch. 7, § 17. Brown v. Certain Logs of Mahogany, 2 Sumn. Hunt, 11 Mass. 45. Locke v. Swan, 589.

was the intention in framing the contract of affreightment. Chase v. Alliance Ins. Co. 9 Allen, 314. This agreement may be proved by parol, and, as a person having no interest in freight cannot insure it, the fact that the shipper effected an insurance on freight is some evidence that the contract in the bill of lading had been modified by a special agreement that the freight should be at the shipper's risk. Atwell v. Miller, 11 Md. 348.

(a) See Byrne v. Schiller, L. R. 6 Ex. 319. If a charterer agrees to pay a gross sum for the use of the vessel, he is obliged to pay if part of the cargo is lost by an excepted peril, without fault on the part of the ship-owner. In Robinson v. Knight, L. R. 8 C. P. 465, a lump sum was to be paid, one half on the arrival of the vessel on her outward voyage, and the remainder on unloading and right delivery of the cargo. Part of the cargo was lost on the homeward voyage by an excepted peril. Held, that the ship-owner was, on delivery of the remainder of the cargo, entitled to the full sum. See also The Norway, Brown & Lush. 226, 3 Moore (N. S.), 245. So held, also, in Merchant Shipping Co. v. Armitage, L. R. 8 C. P. 469, n., where a lump sum was to be paid "after entire discharge and right delivery of the cargo," and part of the cargo was not delivered, it having been destroyed by an excepted peril. This case was affirmed in the Exchequer Chamber, L. R. 9 Q. B. 99. In Duthie v. Hilton, L. R. 4 C. P. 138, freight for a cargo of cement was, by the bill of lading, to be paid "within three days after arrival of ship, and before the delivery of any portion of the goods." After the arrival of the vessel and within the three days the vessel caught fire and was scuttled to save her. When the vessel was raised the cement was found to be worthless, having become hardened into a solid mass. Held, that no freight was payable.

(b) The payment of freight and the delivery of the goods are simultaneous

the amount of freight until delivery, the master (as has appeared) may retain the goods until the freight is paid. In all cases, however, where a delivery is prevented by the neglect or default of the owner of the goods, the freight becomes payable; ¹(a) and it has been decided in Pennsylvania, that if the goods are tendered to the consignee, but the landing of them is prevented by

¹ *Bradstreet v. Baldwin*, 11 Mass. 346, cited in note to *Abbott on Shipp.* 229. *Palmer v. Lorillard*, 16 Johns. (5th Am. ed.) 406.

acts. Freight is not due until the goods are ready for delivery, and the consignee cannot demand the goods until he is ready to pay the freight. The owner of goods is not bound to accept their delivery and pay the freight until he has had an opportunity of ascertaining how far they correspond in quantity and description with the bill of lading and of examining into their actual state and condition. *The Schooner Treasurer*, 1 Sprague, 473. *Clark v. Masters*, 1 Bosw. 177. *Lanata v. Ship Henry Grinnell*, 13 La. Ann. 24. A consignee has no right to demand that the certificate of a particular weigher shall be considered conclusive as to the weight of the cargo. *The Schooner Treasurer*, 1 Sprague, 473. If the master contracts by the bill of lading to deliver seventy-eight tons of egg coal and one hundred tons of stove coal, he is not entitled to his freight on tendering to an assignee of the bill of lading one hundred tons of egg coal and seventy-eight tons of stove coal. *Byrne v. Weeks*, 7 Bosw. 372. A ship-owner cannot demand that the whole freight shall be paid until the whole of the consignment is ready for delivery. But if the shipment is so large that the whole cannot be delivered in one day, the ship-owner can either keep the whole at the expense of the ship, or he may tender part on payment of a *pro rata* freight, and it seems he may in such case, if the consignee refuses to take part, store the part at the expense of the consignee. This is in accordance with the *dictum* of the court in *Brittan v. Barnaby*, 21 How. 527; but it may be doubted whether the consignee has not the right to refuse to pay any freight until he has examined the whole, because the part undelivered may be damaged to a greater extent than the whole freight. See *Clark v. Masters*, 1 Bosw. 177; *Black v. Rose*, 2 Moore (N. S.), 277. The clause in a bill of lading, "The freight payable after receipt of the whole in good order," does not entitle the consignee to the possession of the goods at his store before payment of freight; but "receipt" means receipt on the wharf. *Gauche v. Storer*, 14 La. Ann. 411. In *Paynter v. James*, L. R. 2 C. P. 348, by the terms of a bill of lading freight was to be paid "one-third in cash on arrival at B., and two-thirds on right delivery of the cargo." *Held*, that the delivery of the cargo and payment of the balance of the freight were to be concurrent acts, and that the master was not bound to deliver the cargo, unless the consignee paid, or was ready and willing at the same time to pay, the balance of the freight.

(a) Where the contents of barrels have leaked out on the voyage, if this is owing to the fault of the shipper, full freight is due. *Nelson v. Stephenson*, 5 Duer, 538.

the refusal of the government to allow it to be done, the whole freight is earned.¹ (a)

§ 401. If the ship be captured, the owners of it, of course, lose their freight, as well as the merchant his goods. (b) But in case of recapture and subsequent performance of the voyage at the place of destination, the right to freight revives, and becomes due on the completion of the voyage.² The same rule extends to a resumption of an interrupted voyage after the removal of an embargo by which it was so suspended.³

§ 402. If the vessel, having performed part of her voyage, be disabled from completing the remainder, then transshipment to the place of destination is in furtherance of the original purpose.⁴ In case of such transshipment, it was at one time a question, whether the remainder of the voyage, after the transshipment, was to be considered as performed under the old contract or under a new one, and whether the remuneration was to be at the rate of freight originally contracted for, or on a *quantum meruit*. It is said, however,⁵ to be well settled in England, that if the goods be conveyed safely to the place of destination, the freight shall be that originally contracted for. This was so decided in *Shipton v. Thornton*,⁶ in which the court say: "It may be taken to be either the duty or the right of the owner to transship. If

¹ *Morgan v. North American Ins. Co.* 4 Dallas, 455.

² *Beale v. Thompson*, 3 Bos. & P. 420, 431. *The Race Horse*, 3 Rob. Adm. 101.

³ *Ibid.* *Curling v. Long*, 1 Bos. & P. 637. 2 Holt on Shipp. 135.

⁴ See *ante*, § 187. As to privilege of re-shipping under bill of lading, see *ante*, § 227.

⁵ *Smith*, Merc. Law, 305.

⁶ *Shipton v. Thornton*, 9 A. & E. 314.

(a) *Bradstreet v. Heron*, Abbott, Adm. 209. As to the effect of a seizure by the officers of the customs, see *Gosling v. Higgins*, 1 Camp. 451; *Spence v. Chodwick*, 10 Q. B. 517; *Evans v. Hutton*, 4 Man. & G. 954; *Howland v. Greenway*, 22 How. 491.

(b) Where a vessel loaded with ice was captured by the so-called Confederate States and condemned, it was *held*, that the owners of the cargo were not liable for freight, although before the condemnation the consignees obtained possession of the ice, upon executing a bond with sureties, with condition to pay the appraised value thereof if it should be condemned, which value they were afterwards compelled to pay. *Tirrell v. Gage*, 4 Allen, 245. The contract in this case was under a charter-party and bill of lading which excepted only perils of the seas.

it be the former, it must be so in virtue of his original contract; and it should seem to result from a performance by him of that contract, that he will be entitled to the full consideration for which it was entered into, without respect to the particular circumstances attending the fulfilment. If it be the latter, a right to the full freight seems to be implied. The master is at liberty to transship, but for what purpose, except for that of earning his full freight at the rate agreed on?" (a)

§ 403. In the above case of *Shipton v. Thornton*, the question was incidentally mooted: "If the transshipment can only be effected at a higher than the original rate of freight, which party is to stand to the loss?" The opinion of the court appeared to be that, in such case, the master's right to transship would be at an end, but that he would become the freighter's agent to do what was most for his benefit under the circumstances, and that, consequently, if it were for the freighter's advantage that the goods should be forwarded, and an increased rate of freight incurred, the freighter would be bound by his agreement to pay such increased rate. No authority directly on the point was cited from books of the common law. It was treated very much as a new point to be decided on principle; and the foreign authorities upon the subject of transshipment were elaborately reviewed by Lord Denman. *Mumford v. Commercial Insurance Company*¹ presented the same question. The facts were, that goods were captured during the voyage, and the vessel was released, but the goods detained for further proof, and were afterwards restored on payment of the full freight; but the owner was obliged to hire another vessel to carry the goods to the place of their destination; it was held, that the insurer was liable to pay this additional or increased freight, being an expense necessarily incurred in consequence of the capture. Kent, C. J., who delivered the opinion of the court, said that the point in question was not anywhere adjudged in the English books, but he considered that, in a case in which no English decisions are to be met with, it

¹ *Mumford v. Commercial Ins. Co.* 5 Johns. 262.

(a) See *Rosetto v. Gurney*, 11 C. B. 176, 7 Eng. L. & Eq. 461; *Farnsworth v. Hyde*, L. R. 2 C. P. 204; *Thwing v. Washington Ins. Co.* 10 Gray, 443; *Lemont v. Lord*, 52 Maine, 265.

was usual and proper to listen with attention and respect to foreign jurists.¹ (a)

§ 404. What is called "apportionment of freight" usually happens when the vessel, by reason of any disaster, goes into a port short of the place of destination, and is unable to complete the voyage. In this case, as we have already seen, the master may, if he will and can do so, hire another ship to convey the goods, and so entitle himself to his whole freight; but if he is unable or declines to do this, and the goods are there received by the merchant, he shall be paid according to the voyage performed.² The exception to the general rule, that the contract by the bill of lading is indivisible, and that, therefore, the ship-carrier can recover for no portion of the voyage which has been performed, unless the whole be performed, has already been incidentally stated to be a new contract by the merchant to accept the cargo short of the place of the original destination. If the merchant-freighter himself, or his agent or consignee, are willing to dispense with the performance of the whole voyage, and voluntarily accept the goods before the complete service originally intended is rendered, the law is, and has long been, that a proportionate amount of freight will be due; or as it is termed, "*freight pro rata itineris peracti.*"³ This equitable rule of maritime law is without doubt extremely ancient, it being found, as Lord Mansfield says, in *Luke v. Lyde*,⁴ in the marine laws of Rhodes. The marine law having decided, that in certain cases freight shall be paid *pro rata*, the common law presumes in those cases a promise to that effect as being made by the party who consents to accept his goods at a place short of the port of destination; for he obtains his property, with the advantage of the carriage thus far; and as he cannot be sued for freight on the original contract, as that has not been performed (for the purpose of justice and in furtherance of the marine law), a promise of partial payment is, by the common law, implied from the fact of the acceptance of the cargo.⁵

¹ The learned judge cited Pothier, *Trait. d'Ass. n.* 52; Marsh. on Ins. 172. See Scheffelin, 9 Johns. 21; *Searle v. Scovil*, 4 Johns. Ch. 218.

² Abbott on Shipp. 434.

³ Abbott on Shipp. 434.

⁴ *Luke v. Lyde*, 2 Burr. 889.

⁵ Jones on Carr. 144. Attention has already been called in another chapter to cases, wherein an acceptance of the

§ 405. Upon a review of all the English cases upon the subject, it will appear, that, considering the subject with regard to the proceedings in the courts of the common law, the right to freight *pro rata itineris* must arise out of some new contract between the master and the merchant, either expressly made by them, or to be inferred from their conduct.¹ (a) The contract was inferred from the fact of the acceptance of the goods, in *Luke v. Lyde*.² Lord Mansfield, in that case, manifestly presumed an implied contract from the circumstance that Lyde took the cargo saved into his own possession, and sending it to a different port from that of its original destination, without any demand on the master to send it forward by another ship. The same principle, namely, that the master cannot recover upon the original contract, which he has not performed, but must sue, if at all, upon some new contract, implied or expressed, will be found to pervade all the cases. The contract is expressed where the merchant directly waives the prosecution of the voyage; and it is implied where he accepts the goods, as if he took them as a part of the beneficial service performed, though not the whole. The latter limitation is important, because, if he accepts them only from the necessity of the case, he, under such circumstances, will only take up his own goods; and the court will not be able to imply, that, by such an acceptance, he had any intention to waive the completion of the whole agreement.³

goods short of the place of destination not only excuses a non-delivery by the carrier to the place originally intended, but renders the owner or consignee liable for the payment of a *pro rata* freight. See *ante*, § 332. . If a consignee of property sent by a common carrier demands and receives it before it reaches its ultimate destination, he is liable for the full freight. *Violett v. Stettinius*, 5 Cranch, C. C. 559.

¹ *Abbott on Shipp.* 448; *Smyth v. Wright*, 15 Barb. 51.

² *Luke v. Lyde*, 2 Burr. 888.

³ 2 *Holt on Shipp.* 150. In *Cooke v. Jennings*, 7 T. R. 381, Mr. Justice

Lawrence thus expresses himself: "When a ship is driven on shore, it is the duty of the master either to repair the ship, or to procure another; and having performed the voyage, he is then entitled to his freight; but he is not entitled to his whole freight unless he performs the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled *pro rata*, unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties; but here the plaintiff has resorted to the original agreement under which the

(a) See *The Soblomsten*, L. R. 1 Adm. 293; *Cargo ex Galam*, 1 Brow. & L. Adm. 167; *Metcalfe v. Britannia Ironworks Co.* 1 Q. B. D. 613.

§ 406. Such, it may be confidently stated, is, on the whole, the established doctrine in the United States. All the cases, says Mr. Justice Story, "in which the full freight is, on the ordinary principles of commercial law, due, notwithstanding the non-arrival of the goods at the port of destination, may be reduced to the single statement that the non-arrival has been occasioned by no default or inability of the carrier-ship, but has been occasioned by the default or waiver of the merchant-shipper. In the former case, says he, the merchant-shipper cannot avail himself of his own default to escape payment of freight; in the latter he dispenses with the entire fulfilment of the original contract for his own interest and purposes."¹

§ 407. There may be some authorities which hold that a compulsive receipt of goods by the owner would render a *pro rata* freight due. But in such case, says Mr. Justice Story, "I conceive it now to be well settled, that no freight is due," and the learned judge asserts emphatically, that there is no principle which would justify a *pro rata* freight when there has been no voluntary acceptance at an intermediate port, dispensing with the further carriage of them, but only an involuntary sale from necessity, to prevent them from there perishing by a total loss.² In the case of *Welsh v. Hicks*, in New York,³ it is said for the court, by Sutherland, J., that "freight *pro rata itineris* is due where a ship, in consequence of perils of the sea, without any fault of the master, goes into a port short of her destination, and is unable to prosecute the voyage; and the goods are received by the owner at an intermediate port." On the other hand, the learned judge concedes that where the master refuses to repair his ship, or to procure other vessels for the purpose, and the owner of the goods then receives them, that is not such an acceptance of the goods as will entitle the ship-owner to a *pro rata* freight. In such case, the owner does not elect to receive his goods at the intermediate port, and sell them there, or become his own carrier to the port

defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action." These principles were affirmed by Lord Ellen-

borough in *Hunter v. Prinsep*, 10 East, 378.

¹ *The Nathaniel Hooper*, 2 Sumn. 542.

² *Ibid.*, and the numerous authorities there cited.

³ *Welsh v. Hicks*, 6 Cow. 510.

of destination, he does not assent to the termination of the voyage; but it having been terminated against his will by the refusal of the master to send on his goods to the port of destination, he does not, by receiving them under such circumstances, promise to pay the freight to the intermediate port.¹ (a)

§ 408. Upon the question as to the right of the merchant to abandon his goods, when brought to the place of destination, and by so doing, discharge himself from freight, different doctrines

¹ Mr. Justice Story, in a note to the 5th Am. ed. of Abbott on Shipp., commencing on p. 547, thinks that the above case of *Welsh v. Hicks* is entitled to much consideration, as it shows that the mere acceptance of the goods, unless it is a matter of choice, does not *per se* give a title to freight *pro rata*. He also furnishes, in the same note, a summary statement of the American decisions, because they do not, in all respects, perfectly concur. The case of *Luke v. Lyde* seems at first to have been understood to justify the claim of *pro rata* freight, whether there was a voluntary or a compulsive acceptance of the goods at an intermediate port, by the owner or his agent; for *Baillie v. Moudigliani*, Park on Ins. 61, pressed the doctrine so far as to apply it to cases where the proceeds were received after a compul-

sive sale by a prize-court. In *Caze v. Baltimore Ins. Co.*, *ub. sup.*, the Supreme Court of the United States are of opinion that the current of more recent authority points the other way. The weight of authority, in this country, as appears by the note referred to, undoubtedly is, as was held in the case of the *Marine Ins. Co. v. United States Ins. Co.*, 9 Johns. 186, viz., that to give a title to freight *pro rata itineris*, there must be an unequivocal, voluntary, and unconditional acceptance by the owner at an intermediate port, so as to form the basis of a new contract to pay a ratable freight; and that the acceptance of the net proceeds of the property, after a capture and sale by a prize court, and restitution decreed, constituted no sufficient title for such freight.

(a) See *Rogers v. West*, 9 Ind. 400; *Richardson v. Young*, 38 Penn. State, 169. If a vessel is wrecked, and the shipper abandons the cargo to the insurers, who accept the abandonment and take possession of the goods, against the will of the owners of the vessel, who are ready to send the goods on, the shipper is liable for freight *pro rata itineris*. *Smyth v. Wright*, 15 Barb. 51. *McKibbin v. Peck*, 39 N. Y. 262. In such a case, if the owners of the vessel take no steps to forward the goods, freight *pro rata* is not due. *Atlantic Ins. Co. v. Bird*, 2 Bosw. 195. Where a vessel is disabled *in transitu*, and the cargo is transhipped by the master into another vessel at a greater rate of freight than the original, freight *pro rata* is not due the first vessel. *Crawford v. Williams*, 1 Sneed, 205. In *Hopper v. Burness*, 1 C. P. D. 137, the master justifiably sold part of the cargo at an intermediate port, to raise funds for necessary repairs to the vessel, at a greater price than it would have brought at the port of destination. Held, that he was not entitled to *pro rata* freight.

and opinions, it is said, have prevailed, and there is in England no judicial decision; although in some cases, between the merchant and the insurer, it has been admitted that the freight was payable, notwithstanding the goods were so much damaged that their value fell short of its amount.¹ In *Miles v. Bainbridge*,² Lord Ellenborough, C. J., intimated that if the merchant had refused to receive the cargo on the ground of damages occasioned by default of the master, the point would admit of some doubt. In such case, as the merchant would clearly derive no benefit whatever from the conveyance, nor the master have fulfilled his engagement according to the terms of the bill of lading, it may very properly be inquired, what reason is there why the master should oblige the merchant to pay the freight?³ In *Bartram v. M'Kee*, in Pennsylvania,⁴ the point was taken for granted in the Common Pleas and in the Supreme Courts, that if a person carry by land or by sea, and he has not faithfully performed his part, he cannot recover full compensation; and a deduction from the price of freight was made in that case on account of damage to the goods.

§ 409. In *Leech v. Baldwin*, in Pennsylvania,⁵ in an action by common carrier to recover the price of transportation, it was held that the defendant might set up as a defence, negligence or want of skill in the carrier, in consequence of which the goods were deteriorated in value; and that any facts which were proved, tending to show that the plaintiff did not perform his part of the contract, or from negligence and want of skill performed it in such a manner that the defendant suffered loss, the latter might have the amount of such loss, as ascertained by the jury, deducted from the amount of the plaintiff's claim.

§ 410. The plaintiff, who was the owner of a canal-boat, received and gave a receipt for certain casks of nails, in good order, &c., which he agreed to deliver (the dangers of the navigation excepted) in the like good order and condition, to W. L., Philadelphia, he paying freight for the same at a certain rate. On the voyage to Philadelphia the boat struck against a stone in the bot-

¹ Abbott on Shipp. 427.

² *Miles v. Bainbridge*, Guildhall, Dec. 20, 1804, before Lord Ellenborough, C. J., cited in note to Abbott on Shipp. 248.

³ See *Basten v. Butler*, 7 East, 479.

⁴ *Bartram v. M'Kee*, 1 Watts, 39.

⁵ *Leech v. Baldwin*, 5 Watts, 446. See *Humphreys v. Reed*, 6 Whart. 435.

tom of the canal, by which a hole was knocked in her bottom, and the nails became wet and damaged. On her arrival at Philadelphia the captain of the boat delivered the nails at the wharf of the defendants, who were forwarding and commission merchants, with instructions not to deliver them until the freight was paid. The defendants, however, delivered the nails to W. L. without receiving the freight. In trover for the nails, it was held that the defendants had a right to show that, in consequence of the unskilfulness or negligence of the persons engaged in the management of the boat, the plaintiff was not entitled to recover the stipulated freight.¹

§ 411. In an action brought in Illinois to recover the amount of freight agreed to be paid for the transportation and delivery of a certain quantity of merchandise from Buffalo to Chicago, evidence that a portion of the goods agreed to be transported exceeding in value the whole amount of the freight claimed was, through the negligence and improper conduct of the plaintiff, lost and destroyed on the voyage, was held to be admissible as well in the nature of a set-off as, also, for the purpose of reducing the amount sought to be recovered by the plaintiff.² It is held likewise in South Carolina, that where the damage done to the goods by the carrier exceeds the freight, to that extent the carrier's right to freight is defeated.³

§ 412. On the same principle, want of seaworthiness may be set up as a defence in an action to recover the price of carrying. In *Dickinson v. Haslit*, in Maryland,⁴ which was an action by the shipper of goods against the captain and consignee of the cargo, to recover money retained for freight, it was held, that the plaintiff was at liberty to show that the vessel was not seaworthy at the commencement of the voyage, in order to resist the defendant's claim to freight; and that, if the jury believed the vessel not to have been seaworthy and competent to perform the voyage at the time of its commencement, then the defendant was not entitled to retain any thing for freight, and that the plaintiff was entitled to recover the amount he claimed.

§ 413. It is clear, then, that if a common carrier demand compensation on a *quantum meruit*, the owner may show, in bar of such

¹ *Humphreys v. Reed*, 6 Whart. 435.

² *Ewart v. Kerr*, 2 McMull. 141.

³ *Edwards v. Todd*, 1 Scam. 463.

⁴ *Dickinson v. Haslit*, 3 Harris & J. 345.

demand for compensation, that the goods were damaged in the transportation, by the default of the carrier, to an amount exceeding that of a fair rate for the carriage.¹ And also, that, as the owner may show, in answer to the carrier's claim to recover freight, that the goods were by his default injured in the transportation, his right of lien is liable to be defeated in the same way.²

§ 414. But if the carrier has conducted himself with vigilance and fidelity in the course of the voyage, he has no concern with, nor is he answerable for, the value of the goods.³ A ship-owner performs his engagement when he carries and delivers the goods; the right to his freight then becomes absolute, and the carrier is not an insurer of the soundness of the cargo, as against its own intrinsic decay;⁴ not more so than he is of the price in the market to which the cargo is carried. It may impair the remedy which his lien afforded, but does not affect his personal demand against the shipper.⁵ Such was the language of the court in *Griswold v. New York Insurance Company*.⁶ If casks contain wine, rum, or other liquids, or sugar, and the contents are washed out and wasted by the sea, so that the casks arrive empty, no freight is due for them;⁷ but the ship-owner would still be entitled to his freight, if the casks were well stowed, and their contents were essentially gone by leakage, or inherent waste, or imperfection of the casks.⁸ (a)

¹ *Schureman v. Withers, Anthon*, N. P. 230.

² *Ewart v. Kerr*, 1 Rice, 203.

³ *Leech v. Baldwin*, 5 Watts, 446.

⁴ *Ante*, §§ 210, 211 *et seq.*

⁵ 3 Kent, Com. 224.

⁶ *Griswold v. New York Ins. Co.* 3 Johns. 321. And see *Saltus v. Ocean Ins. Co.* 14 Johns. 138.

⁷ See *ante*, § 212.

⁸ 3 Kent, Com. 224. *Frith v. Barker*, 2 Johns. 327. When the goods become greatly deteriorated on the voyage, it has been a litigated question whether the consignee is bound to take the goods and pay the freight, or whether he may not abandon the goods to the master in dis-

charge of the freight. Valin and Pothier have entertained opposite opinions on this question. Val. Com. tome i. 670. Poth. Ch. Partie, No. 5. The former insists, that the regulation of the ordinance, holding the merchant liable for freight on deteriorated goods, without right to abandon them in discharge of the freight, is too rigorous to be compatible with equity. He says the cargo is the only proper fund and pledge for the freight, and that Casaregis was of the same opinion. Disc. 22, n. 46; Disc. 23, n. 86, 87. Pothier, on the other hand, was against the right of the owner to abandon the deteriorated goods in discharge of the freight, and this is

(a) *Nelson v. Stephenson*, 5 Duer, 538. *Nelson v. Woodruff*, 1 Black, 156.

The carrier has also a right for freight and charges paid, although the goods may have suffered damage before they reached him, while in the hands of a preceding carrier.¹ (a)

§ 414 a. The adoption of the principle, that the bill of lading is conclusive on the carrier, not only as to the apparent, but also as to the actual condition of the goods, would impose on him the necessity of opening, for self-protection, every box of merchandise, to examine and ascertain the condition of its contents, before he receives it. Besides, the injury that would be inflicted on the owners of freight would be a cogent argument against such a requisition. A carrier, therefore, who receipts for goods as in good condition, is not estopped to show that they were in fact damaged before they came into his possession. He may show a mistake or a fraud in opposition to the recital in the bill of lading, that the goods were in "good order and condition."²

§ 415. In an action by a common carrier to recover the price of transportation, the defendant cannot give evidence of a breach of contract in a different transaction in which unliquidated damages might be due to him; for matters sounding in tort arising out of a different transaction cannot be given in evidence as a set-off, though they may be taken advantage of when they arise out of the same transaction, and go to defeat the plaintiff's action.³ (b)

§ 416. Freight being the reward to which a person is by law entitled for bringing goods lawfully upon a legal voyage, it is an answer to an action for freight, that the voyage in respect to which it is claimed was illegal, for *ex turpi causa non oritur actio*, or, as it is interpreted by Lord Mansfield, "justice must be drawn from pure fountains."⁴ (c) The legal presumption, however, is,

the better opinion. 3 Kent, Com. 224. The opinion of Pothier was adopted in the case of *Griswold v. New York Ins. Co.* *ub. sup.*

¹ *Bowman v. Hilton*, 11 Ohio, 303.

² *Chitty on Cont.* 481. *Warden v. Greer*, 6 Watts, 424. *Gowdy v. Lyon*, 9 Mon. 112. That a bill of lad-

ing is a mere receipt, subject to be opened by proof, see also *ante*, § 231.

³ *Gogel v. Jacoby*, 17 S. & R. 117, and cited in *Leech v. Baldwin*, *ub. sup.*

⁴ See *Abbott on Shipp.* 426; *Muller v. Gernon*, 3 Taunt. 394; *Blanch v. Solly*, 8 Taunt. 89.

(a) *Bissel v. Price*, 16 Ill. 408. *White v. Vann*, 6 Humph. 70.

(b) See *Hill v. Leadbetter*, 42 Maine, 572.

(c) See *ante*, § 356, n.

that the voyage was legal, as every thing must be taken to be legal until the contrary is proved.¹

§ 417. If the captain be paid his freight on an illegal voyage for goods which are lost or damaged, he is answerable for them, in case the owner of them was not privy to the illegality;² and, on the other hand, if a freighter, by loading prohibited or unlawful goods, occasions the ship's detention, or otherwise impede her voyage, he shall pay the freight contracted and agreed for.³

CHAPTER X.

OF ACTIONS AGAINST CARRIERS, THE DECLARATION, PLEAS, EVIDENCE, DAMAGES, AND THE PARTIES TO SUE AND BE SUED.

1. Action against a Common Carrier for refusing to receive Goods.
2. Proceedings in the Admiralty against Common Carriers for the Loss of Goods.
3. Actions at Common Law for the Loss of Goods by Carriers.
4. Action on the Case.
5. Declaration in Action on the Case may contain a Count in Trover.
6. Action of Assumpsit.
7. Distinctive Character of the Declaration, as to whether Case or Assumpsit.
8. As to the Allegations, &c., in the Declaration.
9. Pleading.
10. Evidence.
11. Damages.
12. The Parties to sue.
13. The Parties to be sued.

¹ Bennett v. Clough, 1 B. & Ald. 461. ² Jones on Carr. 153. Beawes, 191. ³ Sissons v. Dixon, 5 B. & C. 758. Lex Merc. 191.

² Hatchwell v. Cooke, 6 Taunt. 577.

1. Action against a Common Carrier for refusing to receive Goods.

§ 418. IT has been already laid down, that a common carrier is bound to receive and carry all the goods offered for conveyance, and that he is liable to an action in case of refusal, provided there be offered a reasonable compensation.¹ The form of action in such cases is case, in which it is necessary that it should be averred in the declaration, that the plaintiff was willing and ready to pay the defendant the amount which the defendant was legally entitled to receive for the receipt and carriage of them; though it is not necessary that he should aver an absolute tender. It was so decided in the case of *Pickford v. Grand Junction Railway Company*;² and it was asserted by the counsel for the plaintiffs in this case, that no precedent of a declaration against a carrier for refusing to carry goods was to be found in the books. The declaration in this case stated: "That whereas the defendants, before and at the time hereinafter mentioned, to wit, on the 24th of November, 1840, were common carriers of goods and chattels for hire from Birmingham, in the county of Warwick, to Manchester, in the county of Lancaster, and from Manchester aforesaid to Birmingham aforesaid, and thereupon heretofore, to wit, on the said 24th of November, 1840, the plaintiffs caused to be tendered to the defendants, they being such common carriers as aforesaid, to wit, at a certain place in Birmingham aforesaid, being the place by them then used in the way of their said business as common carriers for the receipt of parcels and goods to be by them carried and conveyed as such common carriers as aforesaid, a certain parcel of goods of the plaintiffs, to wit, a hamper containing divers goods then of great value, to wit, of the value of £100; and then requested the defendants to receive and to carry and convey the same from Birmingham aforesaid to Manchester aforesaid; and the defendants then had ample convenience³ for receiving and carrying and conveying the same according to the said requirement of the plaintiffs in that behalf; and the plaintiffs were then ready and willing, and then offered to pay to the defendants such sum of money as the defendants

¹ *Ante*, § 124.

³ See *ante*, § 125.

² *Pickford v. Grand Junction R. 8 M. & W. 372.*

were legally entitled to receive for the receipt and carriage and conveyance of the said parcel, and all other charges whatsoever which the defendants were then authorized or in any wise entitled to make or receive for the receipt, carriage, and conveyance of the said parcel from Birmingham aforesaid to Manchester aforesaid, to wit, the sum of £2; and the defendants then had notice of the premises; yet the defendants, not regarding their duty as such common carriers as aforesaid, but contriving, and wrongfully and unjustly intending to injure the plaintiffs, though they did receive as aforesaid, and carry and convey, the goods of divers other persons on that occasion from Birmingham aforesaid to Manchester aforesaid, did not, nor would, at the said time when they were so requested, or at any time afterwards, receive the said parcel, or carry or convey the same from Birmingham aforesaid to Manchester aforesaid, but wholly neglected and refused so to do, though they might and could and ought as such carriers to have received and carried and conveyed the same as aforesaid; whereby the plaintiffs were then forced and obliged to carry and convey the said parcel from Birmingham aforesaid to Manchester aforesaid, with great labor, cost, and inconvenience, and were put to great expense, &c., in and about the carriage and conveyance of the said parcel, &c., and were and are otherwise greatly annoyed, injured, inconvenienced, and damaged." To this declaration there was a special demurrer, assigning for cause, that the declaration did not aver a tender to the defendants of the money which they were entitled to receive for the carriage of the goods. On joinder in demurrer, the judgment of the court was delivered by Parke, B., who said: "The court think that this is not like the case of a strictly legal tender, a term which is only applicable where an absolute duty, such as the payment of an antecedent debt, is imposed on the party making it, in which case the tender stands in the place of payment, and is in fact payment, so far as it is in the power of the party tendering to make it one, but which remains incomplete only because the party to whom the money is offered refuses to accept it. Such a tender we consider to be altogether unnecessary in the present case; the acts to be done by both parties, namely, the receipt of the goods, and the payment of a reasonable sum for their carriage, being contemporaneous acts; the carrier being bound to receive the goods on the money being paid or tendered, and the bailor

to pay the reasonable amount demanded, on the carrier's taking charge of the goods. The case of *Rawson v. Johnson* clearly shows, that whenever a duty is cast on a party, in consequence of a contemporaneous act of payment to be done by another, it is sufficient if the latter pay, or be ready to pay, the money, when the other is ready to undertake the duty. Here the acts to be done by the plaintiffs and defendants are altogether contemporaneous. The money is not required to be paid down by the plaintiffs until the carrier receives the goods, which he is bound to carry. Our judgment, therefore, must be for the plaintiffs."¹ (a)

2. Proceedings in the Admiralty against Common Carriers for the Loss of Goods.

§ 419. For the loss of goods delivered to a common carrier for transportation by sea, or to one, the substantial part of whose service is to be performed within the limits of tide-water, (b) the

¹ The case of *Rawson v. Johnson*, cited by the learned judge (1 East, 203), was an action for the non-delivery of malt, which the defendant had undertaken to deliver on request, at a certain price, and it was held sufficient for the plaintiffs in the declaration to aver such request, and that they were ready and willing to receive the malt and to pay for it according to the terms of the sale, but that the defendant refused to deliver it, without averring any actual tender of the price; and Lord Kenyon said: "Under this averment the plaintiffs must have proved that they were prepared to tender and pay the money, if the defendant had been ready to receive it, and to have the goods delivered; but it cannot be necessary, in order to entitle them to maintain their action, that they should have gone through the useless ceremony of laying the money down, in order to take it up again. It would be repugnant to common sense to require it." A strictly legal tender, it was admitted by the counsel for the plaintiffs in the case of *Pickford, &c., supra*, was necessary, where there is a pre-existing debt, the amount of which may be ascertained with precision by the party tendering it. The words "tender" and "offer" are used in several instances, however, as meaning the same thing. See *Levy v. Herbert*, 7 Taunt. 314; *Waterhouse v. Skinner*, 2 Bos. & P. 447; *Marshall v. York* R. 11 C. B. 655, 7 Eng. L. & Eq. 519.

(a) See *Crouch v. Great Northern R.* 11 Exch. 742; 34 Eng. L. & Eq. 573.

(b) The jurisdiction of the admiralty does not now depend on tide-water. *The Genesee Chief v. Fitzhugh*, 12 How. 443. *Fretz v. Bull*, 12 How. 466. *Jackson v. Steamboat Magnolia*, 20 How. 296. *The Hine v. Trevor*, 4 Wall. 555. As to the jurisdiction of the admiralty over contracts of affreightment, see 2 Parsons, Mar. Law, 559-566. Whether there is jurisdiction when the vessel is engaged in navigation between ports of the same States has been

proceeding against him may, under the Constitution of the United States, be in the admiralty, as well as at common law.¹ (a) Thus, a libel in the admiralty was entertained in the case of *The Citizens' Bank v. The Nantucket Steamboat Company*,² for the non-delivery of certain packages of bank-bills by the respondents, which were delivered to them to be carried from Nantucket to New Bedford. The libel was not *in rem*, but against the Steamboat Company alone, and no question was made (and in the judgment of Mr. Justice Story there was no just ground for such question) that the cause was a case of admiralty and maritime jurisdiction in the sense of the Constitution of the United States, of which the District Court had full jurisdiction; and therefore it was properly to be entertained by the Circuit Court, on appeal from the District Court.

§ 420. At the December term of the Supreme Court of the United States, 1847, a decree of the Circuit Court of Rhode Island was affirmed, which was a judgment upon a libel *in personam* against a steamboat company for the loss of specie carried in their boat, and lost by fire in Long Island Sound. The question of admiralty jurisdiction in this case was very elaborately and very learnedly discussed both at the bar and by several of the judges. Nelson, J., considered the contract of conveyance was a

¹ *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 378. *King v. Shepard*, 3 Story, 349.

² *Citizens' Bank v. Nantucket Steamboat Co.* 1 Story, 16, cited more fully, *ante*, §§ 102, 103.

questioned. The doctrine of *Allen v. Newberry*, 21 How. 244, seems to go to this extent. In *The Emma Johnson*, 1 Sprague, 527, no question was made as to the jurisdiction; but the point was raised in the Circuit Court, and the jurisdiction sustained, by Clifford, J. The question is settled in favor of the jurisdiction by the case of *The Belfast*, 7 Wall. 624. The question, whether the admiralty has jurisdiction of a suit *in personam* against a non-resident debtor of the district in which the suit is brought, by an attachment of his property within the district, has, after many conflicting decisions in inferior courts, been settled in the affirmative. *Atkins v. The Disintegrating Co.* 18 Wall. 272.

(a) In *Place v. Potts*, 5 H. L. Cas. 383, to an action by a ship-owner at common law against a charterer for freight, a plea stating that on a suit in the Admiralty Court by an obligee of a bottomry bond given on the vessel and freight, the defendant had been ordered to bring the freight into court, was held good. See *infra*, § 610.

maritime contract, and the service a maritime service to be performed upon waters within the ebb and flow of the tide ; and that therefore, according to several cases in admiralty which had been before the court at former periods, it was within the jurisdiction of the admiralty. In this opinion Mr. Chief Justice Taney, Mr. Justice McLean, and Mr. Justice Wayne (as the reporter understands) concurred. Mr. Justice Catron treated the question as one not depending on contract, but upon a tort ; as the fire occurred on the high seas, it was a tort there, and the locality of the tort is the *locus* of jurisdiction. Mr. Justice Woodbury (after an elaborate review of the authorities, as to the true line of discrimination between the jurisdiction belonging to the common-law courts and that in admiralty) was inclined not to rest jurisdiction in the admiralty over a transaction like the one in question on contract alone ; but he was in favor of the affirmance of the decree on the ground of a recovery for the wrong committed as a marine tort, rather than on any breach of contract which could be prosecuted in the admiralty. But Mr. Justice Daniel was wholly in favor of reversing the decree of the Circuit Court and of dismissing the libel ; but all the rest of the learned judges, it seems, were against him on the grounds above stated.¹

§ 421. In the course of the argument in the case of *The Citizens' Bank v. The Nantucket Steamboat Company*,² it was intimated, that in libels of this sort, the proceedings might properly be instituted both *in rem* against the steamboat, and *in personam* against the owners and masters thereof. But Mr. Justice Story thereupon was induced to declare, that he knew of no principle or authority, in the general jurisprudence of Courts of Admiralty, which would justify such a joinder of proceedings, so different in their nature and character, and decretal effect ; but, on the con-

¹ *New Jersey Steam Nav. Co. v. Merchants' Bank*, *ub. sup.* In the case of *The Huntress*, *Daveis*, 94, which in its features was like the case just cited, the question whether the Admiralty Court had jurisdiction over the cause as one arising on contract growing out of a maritime service, was not raised by counsel nor adverted to by the court. But there is appended to the opinion of the court

holding the carrier liable, some valuable and learned observations in vindication of its taking cognizance of causes of this description ; and it is stated that the competency of the court to pass upon such questions had been, in the Maine District, in several cases in which the same general question was involved, maintained.

² *Ub. sup.*

trary, every practice of this sort had been discountenanced as illegal and improper. (a)

3. Actions at Common Law for the Loss of Goods by Carriers.

§ 422. It appears by the two cases last cited, that common carriers by sea are liable to be proceeded against in the admiralty for the loss of goods delivered to them for transportation, both *ex contractu* and *ex delicto*, or, in other words, for a breach of contract and for a breach of duty. But in respect to the proper form of action at common law against all common carriers there was for a long time a question, and one much agitated among pleaders; and it was natural that the question should arise out of the innovation upon the common-law duties of carriers. As long as their occupation was considered only as a public duty, the breach was tort, for which they were liable to an action on the case, founded upon the custom of the realm; or, in other words, upon the common law. In time, however, they succeeded in establishing the existence of a contract, and then they at once became liable to an action of assumpsit on their undertaking; and a very long-established, continued, and uniform usage has sanctioned the principle and adopted the advantages of both forms of action; so that the case may be considered either way, as arising *ex contractu* or *ex delicto*, according as the neglect of duty, or breach of promise, is intended to be relied on as the cause of injury.¹ (b)

¹ Jeremy on Carr. 116, 117. And see the concluding portion of the note to *Coggs v. Bernard*, in 1 Smith's Leading Cases, 96 (Am. ed., Philadelphia, 1847). Also *Boson v. Sandford*, Salk. 44, and 2 Show. 478. Per Dennison, J., in *Dale v. Hall*, 1 Wils. 282: "The declaration upon the custom of the realm is the same in effect with the present declaration (in assumpsit). In the old forms, it is that the defendant *suscepit*, &c., which shows that it is *ex contractu*," and this

authority was cited by Lord Kenyon in *Buddle v. Wilson*, 6 T. R. 373. See also *Govett v. Radnidge*, 3 East, 63; *Ross v. Johnson*, 5 Burr. 2825; *Dickon v. Clifton*, 2 Wils. 319; *Powell v. Layton*, 2 Bos. & P. 365; *Hambly v. Trott*, Cowp. 375; *Bretherton v. Wood*, 3 Brod. & B. 54; *Orange Bank v. Brown*, 3 Wend. 158; *Weed v. Schenectady R.* 19 Wend. 534; *Smith v. Seward*, 3 Barr, 342; *Pozzi v. Shipton*, 8 A. & E. 963.

(a) This point is left undetermined by the admiralty rules promulgated by the Supreme Court. See 2 Parsons, Mar. Law, 675.

(b) *Tattan v. Great Western R.* 2 Ellis & E. 844. *Baylis v. Lintott*, L. R. 8 C. P. 345. *School District v. Boston, Hartford, & Erie R.* 102 Mass. 552.

The practice of declaring against common carriers on the custom of the realm was as ancient as the law itself, and was uniformly adopted until the case of *Dale v. Hall*,¹ when the practice of declaring in assumpsit succeeded ; but for four hundred years before that time the declaration was in tort on the custom.²

4. Action on the Case.

§ 423. Each of the two forms of action, and modes of considering the question above mentioned, has its peculiar advantages and inconveniences ; and first, as to the action on the case for a breach of duty, or for a tort. As a general rule, where there is any doubt, as to the defendants, it is better if possible to declare in tort, rather than *ex contractu*, for the reason that the consequences of a misjoinder or nonjoinder of parties are less serious in the former than in the latter case.³ In the case of *Bretherton v. Wood*, in the Exchequer Chamber,⁴ there were too many defendants. The plaintiff below, in an action on the case against ten defendants as proprietors of a coach, for injuries sustained by the plaintiff, in consequence of negligence in driving, the jury found a verdict against eight of the defendants, and in favor of the other two. Dallas, C. J., who delivered the judgment of the court, said : “ This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods and passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it. It appears by the different books of entries, *Brownlow Redivivus*, 11 ; *Clift*. 38, 39 ; *Mod. Ent.* 145, that this form of action is a very ancient use. Nor is it material whether redress might or might not have been had in an action of assumpsit : that must depend on the circumstances of which this court has no knowledge ; but whether the action of assumpsit might or might not have been maintained, still this action on the

¹ *Dale v. Hall*, *ub. sup.*, decided in 1750.

² Per Bayley, J., in *Ansel v. Waterhouse*, 2 Chitt. 1.

³ See the cases referred to in the preceding section.

⁴ *Bretherton v. Wood*, 3 Brod. & B. 54.

case may be maintained. The action of assumpsit, as applied to cases of this kind, is of modern use. If the action be not founded on a contract, but on breach of duty depending on the common law, on a tort or misfeasance, it cannot be contended that the judgment is erroneous; for, from the nature of the case, and the form of the action, it is several and not joint, and may be maintained against some only of those against whom it is brought.”¹

§ 424. So in *M’Call v. Forsyth*, in Pennsylvania,² it was held, that for an injury done to a passenger by the upsetting of a stage-coach, the remedy of the party might be either case or assumpsit; and that if the former is adopted, he may recover against all those who are liable; but if the latter, the plaintiff, to entitle him to recover, must prove the liability of all the parties sued.

§ 425. It has long been well settled in England, that if a carrier in partnership is sued singly in an action arising *ex delicto*, he cannot plead the nonjoinder of the others in abatement or in bar, or give it in evidence under the general issue; for a plea in abatement can only be adopted in those cases where regularly all the parties must be joined, and not where the plaintiff may or may not join them at his election.³ Therefore, to an action on the case against the defendants, part owners of a ship, for the negligence of their servant in running down a ship laden with sugar, belonging to the plaintiff, whereby the sugar was lost, it was held that the defendants could not plead in abatement, that there were other part owners not joined in the suit, because the action being *ex delicto*, the trespass was several.⁴ So, in an action on the case against a common carrier by land, for not safely carrying a passenger, it was held that the defendant could not plead in abatement the nonjoinder of a co-proprietor.⁵

§ 426. The subject was very fully considered by Mr. Chief Justice Savage, in giving the opinion of the court in the case of *Orange Bank v. Brown*, and five others, in the Supreme Court of the State of New York.⁶ In this case there were too few

¹ The decision in this case was cited and approved by Baron Parke, in giving judgment in *Wyld v. Pickford*, 8 M. & W. 490.

² *M’Call v. Forsyth*, 4 Watts & S. 179. A verdict against one defendant, and in favor of another, *held good* in *Smith v. Seward*, 3 Barr, 342.

³ *Gow on Part. 201. Childs v. Sands*, Carth. 294.

⁴ *Mitchell v. Tarbutt*, 5 T. R. 649.

⁵ *Ansell v. Waterhouse*, 2 Chit. 1.

⁶ *Orange Bank v. Brown*, 3 Wend. 158.

defendants. The defendants were charged in the declaration as common carriers, for the loss of property put on board their steamboat for transportation, and the *gravamen* was stated to have arisen from a breach of duty; and there was a plea in abatement that there were fifty-four other proprietors who were jointly liable. The learned judge, after an elaborate review of the English authorities, commencing with one of the earliest cases concerning the point in question, viz., *Boson v. Sandford*,¹ and ending with the case of *Bretherton v. Wood*, decided in 1821,² says: "It is not to be denied that there has been a difference of opinion between some of the English judges on the question, whether an action against a common carrier is an action founded on a tort or on a contract. Dallas, C. J., seems to put that question at rest by bringing it to a very fair test: Does it require the plaintiff to show a contract, express or implied, to support it? The action on the case was at last decided to be for a tort."³ This was clearly the opinion of Lord Mansfield, in the case cited by Chief Justice Mansfield;⁴ and all the cases in which it has been held necessary to join all the joint owners, have been said by distinguished judges to be clearly actions upon a promise. Much of the confusion has probably grown out of the forms of declaring in some of the cases where it is difficult to determine whether the promise and undertaking often stated in the count, or the custom of the realm, also stated, is intended by the pleader to be the foundation of the action. I apprehend the true rule now is, that the action solely upon the custom is an action of tort; that in such action all or any number of the owners of a vessel, coach, or any kind of conveyance used by common carriers, may be used, and judgment may be rendered on a verdict against all or a part only of those against whom the action is brought; the plaintiff has his choice of remedies, either to bring *assumpsit* or *case*; and that when one or the other action is adopted it must be governed by its own rules. But if the plaintiff states the custom, and also relies on an undertaking general or special, as in *Boson v. Sandford*,⁵ and some others, then the

¹ *Boson v. Sandford*, 2 Show. 478.

² *Bretherton v. Wood*, 3 Brod. & B. 54, and *ante*, § 423.

³ *Ibid.*

⁴ *Powell v. Layton*, 5 Bos. & P.

365, in which the opinion was given by Sir James Mansfield, C. J., citing the opinion of Lord Mansfield, in *Hambly v. Trott*, Cowp. 375.

⁵ *Boson v. Sandford*, 2 Show. 478.

action may be said to be *ex delicto quasi ex contractu*, but in reality is founded on the contract, and to be treated as such. In *Allen v. Sewall*, in giving the opinion of the court, I remarked that all the copartners should have been sued, as the action was *quasi ex contractu*. It was unnecessary in that case to say any thing on that point, as no plea in abatement had been pleaded; and upon further examination I am satisfied the remark is incorrect, for the reasons above assigned.¹ It is certainly now settled in England that an action against a common carrier upon the custom is founded on a breach of duty; that it is a tort or misfeasance; and it follows that it is joint or several. In the case now under consideration all the counts are substantially upon the custom and in case, though some of them contain expressions similar to those used in actions of assumpsit; but there is none of them which relies upon any undertaking of the defendants, and they all state the *gravamen* to be a breach of duty. I am, therefore, of opinion that an action on the case against a common carrier belongs to the class of actions arising upon a tort or misfeasance *ex delicto*; and that such actions, being as well several as joint, it is unnecessary to join all the tort-feasors."² (a)

§ 427. It has been said that if the plaintiff himself shows in his declaration or other pleading that the tort was jointly done by the defendant and A. B., the action shall abate;³ but Mr. Sergeant Williams observes, there is no ground for the distinction.⁴

¹ *Allen v. Sewall*, 2 Wend. 338.
The action in this case was an action on the case as for a tort.

³ *Brickhead v. Archbishop of York*, Hob. 199.

⁴ 1 Wms. Saund. 291. Coll. on Part. 640.

² See also *Weed v. Schenectady R.* 19 Wend. 534.

(a) By statutes in New York, any joint-stock company or association, consisting of seven or more shareholders, may sue and be sued in the name of the president or treasurer; and suits against an association are required to be in the first instance against one of these officers, and if the execution on a judgment is returned unsatisfied the shareholders may be sued. These provisions, however, are not binding in another State, and the remedy must be pursued according to the law of the State where the action is brought. It has accordingly been held in Massachusetts that the shareholders in such an association may be sued as partners. *Gott v. Dinsmore*, 111 Mass. 45. In this case, which was a contract against common carriers, some of the shareholders were not joined; no plea in abatement was filed, and the non-joinder was held not to be a defence.

The position which was advanced, that where there is any doubt as to the parties defendants, it is better, if possible, to declare in tort rather than *ex contractu*, because the consequences of a misjoinder or nonjoinder are less serious in the former than in the latter case, is therefore entirely supported.¹

§ 428. Another advantage of declaring in case upon a tort, when the circumstances are such as to give the plaintiff an election, is, that it is not necessary to state the undertaking with as much form as is required in an action of *assumpsit*; ² for it is a general well-settled principle, that in declaring on an executory contract, great exactness is demanded, and the plaintiff must prove his case as laid.³ In all cases where the action is not on the contract, but for a breach of collateral duty, the gist is a personal tort;⁴ and it is enough that the proof conforms substantially to the statements in the declaration.⁵ Thus, where the allegation was negligence in the conduct and management of the fires in the furnaces of a steamboat, while such boat was passing the plaintiff's building, it was held competent to prove that the fires were unusually large when the boat left the dock, shortly before.⁶

§ 429. In an action on the case against a common carrier, it is not necessary to state what his duty was; it being sufficient to state, as inducement, that he is a common carrier, the delivery of the goods, &c., to be carried from A to B for certain hire or reward; and, as injury, that the defendant lost the goods through negligence, omitting the allegation of any promise.⁷ The liability

¹ See Browne on Actions at Law, 310; 2 Chitt. Pl. 156, n. (h). This is not merely a formal distinction. A court of law will not sustain an action for contribution between two joint trespassers; or between defendants condemned in damages for a joint offence, or cause of action arising *ex delicto*; and the defendant on whom the whole is levied has no remedy over. And there appears to be no decision to the contrary in chancery. Per Chancellor Kent, in *Peck v. Ellis*, 2 Johns. Ch. 136, and the cases there cited of *Lingard v. Bromley*, 1 Ves. & B. 117; *Phillips v. Biggs*, Hard. 164.

² Per Parke, Baron, in *Wylde v. Pickford*, 8 M. & W. 443.

³ See opinion of Cowen, J., in *Weed v. Schenectady R.* and the cases there cited.

⁴ *Zell v. Arnold*, 2 Penn. 292, opinion of Gibson, C. J., who said it was emphatically the *gravamen* in an action against a barber for barbering his customer, *negligenter et inartificialiter*. *Everard v. Hopkins*, 2 Bulst. 333.

⁵ *Ibid.* 1 Arch. N. P. 412.

⁶ *Cook v. Champlain Trans. Co.* 1 Denio, 91.

⁷ 1 Arch. N. P. 412; and see opin-

of a common carrier for the loss of goods being a liability founded on the custom of the realm, it is not only unnecessary, but improper, to recite such custom; because it tends to confound the distinction between special customs which ought to be pleaded, and the general customs of which the courts are bound to take notice without pleading.¹

5. Declaration in Action on the Case may contain a Count in Trover.

§ 430. Another advantage of bringing an action on the case against a carrier for a breach of duty is, that a count in trover

ion of Cowen, J., in *Weed v. Schemnectady R. ub. sup.*

¹ 1 Chitt. Pl. 248. As it respects the inducement, the declaration states: "For that whereas the defendant before and at the time of the delivery of the goods and chattels to him as next hereinafter mentioned was, and thence hitherto has been and still is, a common carrier of goods and chattels for hire from — to —; and whereas, also, the plaintiff, whilst the defendant was such common carrier as aforesaid, to wit, on —, caused to be delivered to him the said defendant, and the defendant then accepted and received of and from the plaintiff a certain box containing divers goods and chattels, to wit [specifying them], of the plaintiff of great value, to wit, of the value of — dollars, to be safely and securely carried and conveyed by him the said defendant from — aforesaid to — aforesaid, and there, to wit, at — aforesaid, safely and securely to be delivered for the plaintiff, for certain reasonable reward to him the defendant in that behalf." In respect to the injury: "Yet the defendant, not regarding his duty as such common carrier as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive, defraud, and injure the plaintiff in this behalf, did not, nor would, safely or securely carry or convey the said box and its

contents aforesaid from — aforesaid to — aforesaid, nor there, to wit, at — aforesaid, safely or securely deliver the same for him the plaintiff; but, on the contrary thereof, the said defendant, so being such common carrier as aforesaid, so carelessly and negligently behaved and conducted himself in the premises, that by and through the carelessness, negligence, and fault of the defendant in the premises, the said box and its contents aforesaid, being of the value aforesaid, became and were wholly lost to the plaintiff." Then as to the damage: "Whereby, &c. (*stating special damage, if any*) to the plaintiff's damage of — dollars, and thereupon he brings suit." 1 Arch. N. P. 438. The plea of "not guilty" in this case operates a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or for the purpose for which they were carried. Ibid. The advantages of an action on the case, other than those that the defendant cannot plead in abatement the non-joinder of other parties as defendants, and that the plaintiff may recover if he prove one of several defendants to be liable, which he cannot do in *assumpsit*, are explained by Lord Ellenborough, in *Govett v. Radnidge*, 3 East, 70.

may be joined with the other counts. In the case of *Dickon v. Clifton*,¹ the declaration was in case with a count in trover; and Lord Chief Justice Wilmot observed: "I own that in many books it is reported, that trover and a count against a common carrier cannot be joined, but common experience and practice is now to the contrary." The true test, said he, "to try whether two counts can be joined in the same declaration, is to consider and see whether there be the same judgment in both, and not whether they require the same plea; and wherever there is the same judgment in both, I think they may be joined." Clive, J., said: "I am of my lord's opinion, that the true test is to see whether both counts require the same judgment; and in this case they do, and the plaintiff must have judgment." Lord Ellenborough, C. J., in *Govett v. Radnidge*,² recognizing the observation of Lord Chief Justice Wilmot in the case just cited, added, "that when the counts were framed in this manner, it was then the daily and well-warranted practice to join them."³

§ 431. An essential component part, however, of the right to maintain a count in trover, is a conversion by the defendant, which term denotes an act, and is therefore in legal as well as in ordinary construction very different from an omission.⁴ A conversion is, in the language of the law, a misfeasance;⁵ it consists in the commission of a tortious act, and is (to be more definite) the wrongful assumption of the right of ownership over property to the prejudice of the superior owner; as, taking property by assignment from one who had no authority to dispose of it.⁶ The very assuming, says Lord Holt, to one's self the right to dispose of another man's goods, is a conversion;⁷ (a)

¹ *Dickon v. Clifton*, 2 Wils. 319.

² *Govett v. Radnidge*, 3 East, 69.

³ In an action on the case, the counts may be joined with a count in trover. *M'Cahan v. Hirst*, 7 Watts, 175. A count in trover was joined with counts in case in *Dwight v. Brewster*, 1 Pick. 50. And see also *Moses v. Norris*, 4 N. H. 304; *Wylde v. Pickford*, 8 M. & W. 443; and *ante*, §§ 38, 63; *Rooke v. Midland R.*

(County Ct. Appeal), 14 Eng. L. & Eq. 175; *Emery v. Fanning*, 9 Barb. 176.

⁴ *Ross v. Johnson*, 5 Burr. 2827. *Dwight v. Brewster*, 1 Pick. 50.

⁵ For the distinction between misfeasance and negligence, see *ante*, § 12, and 2 Strob. 67.

⁶ *M'Combie v. Davies*, 6 East, 538.

⁷ *Baldwin v. Cole*, 6 Mod. 212. A carrier may be sued in trover for sell-

(a) It is no excuse, for the conversion by a carrier of the property of a consignee, that the consignor fraudulently mis-stated the weight of the goods,

and accordingly, it has been holden, that if a carrier draw out a part of a vessel and fill it up with water, it is a conversion of all the liquor.¹ It is therefore very clear, that if a carrier should sell and transfer the goods intrusted to him for transportation, it is a conversion, because the bailment would be ended.² A undertook to carry flour from B to a certain place, and through mistake deposited by the way a part of the flour, which was taken away by C. On the refusal of B to receive part only, C took the remainder and paid A for the whole. This was held to amount to a conversion by the carrier, which would support a count in trover.³ The master of a ship which is completely wrecked in a foreign port has no power of selling the goods on freight saved from the wreck, unless there be an absolute necessity for such sale;⁴ and such sale, though *bonâ fide* and in market overt, is not binding on the owner of the goods, if the conduct of the vendee imports knowledge of the infirmity of the master's title to sell.⁵

§ 432. So a count in trover will be supported by a delivery of

ing the goods. *Cooper v. Willomatt*, 1 C. B. 672. *Bates v. Stanton*, 1 Duer, 79. *Buel v. Pumphrey*, 2 Md. 261.

¹ *Richardson v. Atkinson*, 1 Stra. 576.

² See *ante* § 349 *et seq.* Every bailee of goods for hire, by selling them, determines the bailment; and the bailor may maintain trover against the purchaser, though the purchase was *bonâ fide*. *Cooper v. Willomatt*, 1 C. B. 672.

³ *Bullard v. Young*, 3 Stew. Ala. 46. See also *Herman v. Drinkwater*, 1 Greenl. 27.

⁴ See *ante*, § 354, and the authorities there referred to.

⁵ *Freeman v. East India Company*,

1 Dowl. & R. 234. And see also as to when trover will lie, *ante*, §§ 38, 63. If any bailee for hire of a thing for a limited period should sell the thing, the bailment would be ended, and a suit might be maintained against him by the bailor for a tortious conversion thereof. Story on Bailm. § 413. *Sargent v. Gile*, 8 N. H. 325. A judgment in an action of assumpsit against a bailee for a breach of his contract to transport and deliver the property bailed, in which the owner has recovered damages for the value of the property, without satisfaction, is no bar to an action of trover against a third person who has purchased the property. *Hyde v. Noble*, 1 N. H. (2d series) 494.

and that the consignee knew that the bill of lading stated the weight at less than it was, and did not notify the carrier thereof. *Wiggin v. Boston & Albany R.* 120 Mass. 201. See also *Peebles v. Boston & Albany R.* 112 Mass. 498. If a carrier refuses to deliver goods except on a condition which he has no right to impose, this is a conversion, and the owner need not tender the freight before suit. *Adams v. Clark*, 9 Cush. 215. *Richardson v. Rich*, 104 Mass. 156. *Peebles v. Boston & Albany R. ubi supra.* *Wiggin v. Boston & Albany R. ubi supra.*

the goods by the carrier or his servant to a wrong person, even though such mis-delivery occurred by mistake;¹ (a) and that there has been no intentional wrong makes no difference.² A mis-delivery may be made by a careful person, who has been deceived by an artifice calculated to circumvent the most careful person, and still it is a conversion (though not necessarily a proof of want of ordinary care), because it gives the dominion over the goods to another.³ Therefore, trover can be supported against a carrier who, under a forged order, delivers goods to a wrong person.⁴

§ 433. But where the act itself is not of a character as decisive as in the above-mentioned cases, other circumstances then became requisite to show a conversion; and for this purpose a demand and refusal are usually relied on to make the act of conversion complete. The mere non-delivery of the goods will not constitute a conversion on the part of the carrier; but if he has them in his possession, and refuses to give them up on demand, it is evidence of a conversion, but the demand and refusal are merely evidence of a conversion, and will not establish it where it appears that no conversion has taken place; as where the goods in the carrier's custody are proved to have been lost through negligence, or have been stolen; and therefore a count in trover will not be supported in such cases, though a count in case will be.⁵ (b) In *Dwight v.*

¹ See *ante*, §§ 324-326. If a warehouseman mis-deliver by mistake, it is a conversion, because it is an act of commission, and not merely omission, as the loss is. *Devereux v. Barclay*, 2 B. & Ald. 702.

² *Ibid.* *Hawkins v. Hoffman*, 6 Hill, 588. *Clark v. Spence*, 10 Watts, 335, per Rogers, J. *Willard v. Bridge*, 4 Barb. 361.

³ Per Parke, B., in *Wyld v. Pick-*

ford, 8 M. & W. 443. *Youl v. Harbottle*, Peake, 49.

⁴ *Ante*, § 322; and see *Lubbock v. Inglis*, 1 Stark. 104.

⁵ *Anonymous*, 2 Salk. 655. Bull. N. P. 44. Said by Lord Ellenborough: "That what begins in contract, a non-performance of what the party undertakes to do; or a bare non-delivery of what he undertook to deliver, is not to be considered as of itself

(a) *Claffin v. Boston R.* 7 Allen, 341.

(b) A carrier is liable in damages for an omission to deliver goods in a reasonable time, but the owner cannot refuse to receive the goods and claim as for a conversion. *Scovill v. Griffith*, 2 Kern. 509.

If a carrier claims to detain goods upon two causes of lien in such a way as to dispense with a tender of the amount claimed on either, he is guilty of a conversion, and no tender need be shown, unless he can sustain both causes. *Kerford v. Mondel*, 5 H. & N. (Am. ed.) 931.

Brewster, in Massachusetts,¹ the declaration (which contained a count in trover) was on the undertaking of the defendants (stage-coach proprietors) to carry for the plaintiffs a package containing bank-notes, which bank-notes were by the defendants lost. The court held, that the count in trover was not supported, because there was no evidence of any actual conversion, or of any demand and refusal; that the bank-notes came lawfully into the possession of the defendants, and that some misapplication of them, or refusal to deliver them, must be proved to entitle the plaintiffs to recover on a count in trover. The same doctrine was held by Bronson, J., in delivering the opinion of the court in *Hawkins v. Hoffman*, in New York.² (a)

6. Action of Assumpsit.

§ 434. The action of assumpsit is the well-known and common remedy for the breach of a contract not under seal; and it not only lies upon all express contracts not under seal, but also in all cases where the law implies a contract. When a person undertakes any office, employment, trust, or duty, he thereby, in contemplation of law, impliedly contracts with those who employ him to perform that with which he is intrusted, with integrity, diligence, and skill; and if he fails to do so, it is a breach of contract for which the party may have his remedy, in most cases, by action

amounting to a tortious conversion. The principle was recognized some time ago in the King's Bench in an action against a carrier for not delivering goods. If the carrier says he has the goods in his warehouse, and refuses to deliver them, that will be evidence of a conversion, and trover may be maintained, but not for a bare non-delivery without any such refusal." *Anon.* 4 Esp. 157. And see *Attersol*

v. Bryant, 1 Camp 409, and opinion of Lord Kenyon in *Youl v. Harbottle*, *ib. sup.*; and *Ross v. Johnson*, 5 Burr. 2825; *Buckmaster v. Mower*, 21 Vt. 204. (b)

¹ *Dwight v. Brewster*, 1 Pick. 50.

² *Hawkins v. Hoffman*, 6 Hill, 588. And see also *Moses v. Norris*, 4 N. H. 304; *Graves v. Ticknor*, 6 N. H. 537; *Beardslee v. Richardson*, 11 Wend. 25. And see *ante*, §§ 38, 63.

(a) See *Rome R. v. Sullivan*, 14 Ga. 277. No demand is necessary before commencing an action for property lost or destroyed by a person having it in custody. *Alden v. Pearson*, 3 Gray, 342. Where a carrier sells goods and claims to retain the proceeds for the freight, and sues the owner of the goods for the freight, and he is not entitled to any freight, the owner of the goods may maintain an action for the proceeds of the sale without any previous demand. *Sayward v. Stevens*, 3 Gray, 108.

(b) *Robinson v. Austin*, 2 Gray, 564. *Bowlin v. Nye*, 10 Cush. 416.

of assumpsit as well as by action on the case. If, for instance, through any gross and culpable negligence of an attorney, his client be damnified, the client may have his remedy, by action of assumpsit or upon the case. So if a common innkeeper allow the goods of his guests to be stolen, or a farrier lame a horse in the shoeing of him; and so if a common carrier or bargemaster lose or injure goods given to him to carry. In all these cases of implied promises, they are in law treated exactly as if they were express promises; and the declaration states the promise exactly as the law implies it.¹ But assumpsit does not lie where there is no certain duty or contract express or implied; and where there is an implied promise, an express promise different from the implied one cannot be stated in the declaration, unless there be some other consideration to support it.²

§ 435. By considering the transaction between a carrier and his employer as constituting a contract between the parties, and by adopting accordingly the action of assumpsit, the plaintiff has the advantage of joining the common money counts, if he has other causes of action to which they are applicable.³ Another

¹ 1 Arch. N. P. 40.

² 1 Steph. N. P. 238. 1 Arch. N. P. 41. *Hopkins v. Logan*, 5 M. & W. 241.

³ 1 Chitt. Pl. 115, 418. The following is Mr. Chitty's form of declaration against a carrier by land (2 Chitt Pl. 355, 7th ed.): "For that whereas the said defendant, before and at the time of the making of his said promise and undertaking herein-after next mentioned, was a common carrier of goods and chattels for hire, in and by a certain wagon (or 'coach'), from a certain place, to wit, from — to a certain other place, to wit, to —, to wit, at, &c. (*venue*). And the said defendant being such carrier as aforesaid, the said plaintiff heretofore, to wit, on, &c. (*day of delivery or about it*), at, &c. (*venue*), aforesaid, at the special instance and request of the said defendant, caused to be delivered to the said defendant, so being such carrier as aforesaid, at, &c. (*venue*), aforesaid, certain goods and

chattels, to wit, &c. [*describe them minutely or as in trover*], of the said plaintiff, of great value, to wit, of — l. of lawful money of Great Britain, to be taken care of, and safely and securely carried and conveyed by the said defendant, as such carrier as aforesaid, in and by the said wagon (or 'coach') from, &c., aforesaid, to, &c., aforesaid (or merely say to, &c., aforesaid omitting *the place from whence they were to be carried*), and there, to wit, at, &c., aforesaid, to be safely and securely delivered by the said defendant for the said plaintiff; and in consideration thereof, and of certain reward to the said defendant in that behalf, he the said defendant being such carrier as aforesaid, then and there, to wit, on the day and year aforesaid, at, &c. (*venue*), aforesaid, undertook, and faithfully promised the said plaintiff to take care of the said goods and chattels, and safely and securely to carry and convey the same in and by the said

advantage of the action of assumpsit is, that it will survive against the executor.¹ On the other hand, the plaintiff is bound to sue all the parties who are jointly liable, and must prove that all the defendants in the action are liable, which we have seen is not so, if he declares in an action on the case for a tort. In declaring in the form of assumpsit, the plaintiff is also precluded from joining

wagon (or 'coach'), from, &c., aforesaid, to, &c., aforesaid (or to, &c., aforesaid), and there, to wit, at, &c., aforesaid, safely and securely to deliver the same for the said plaintiff. And although the said defendant, as such carrier as aforesaid, then and there had and received the goods and chattels for the purpose aforesaid, yet the said defendant, not regarding his duty as such carrier, nor his said promise and undertaking so made as aforesaid, but contriving and fraudulently intending, craftily and subtly, to deceive and injure the said plaintiff in this behalf, hath not taken care of the said goods and chattels, or safely or securely carried or conveyed the same from, &c., aforesaid, to, &c., aforesaid (or to, &c., aforesaid), nor hath there, to wit, at, &c., aforesaid, safely or securely delivered the same for the said plaintiff; but, on the contrary thereof, he, the said defendant, being such carrier as aforesaid, so carelessly and negligently behaved and conducted himself, with respect to the said goods and chattels aforesaid, that by and through the mere carelessness, negligence, and improper conduct of the said defendant and his servants in this behalf, the said goods and chattels being of the value aforesaid, afterwards, to wit, the day and year aforesaid, at, &c. (*venue*), aforesaid, became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*), aforesaid."

Then add a general count for not taking proper care of the goods. (2 Chitt. Pl. 342, 7th ed.) "And whereas also, heretofore, to wit, on,

&c. (*any day while the defendant had the goods, and before title of declaration*), at, &c. (*venue*), in consideration that the said defendant at his special instance and request, then had the care and custody of divers goods and chattels of the said plaintiff, to wit, goods and chattels of the like number, quantity, quality, description, and value, as those in the said *first count* mentioned [*or if this be the first count on the subject, set out the goods and value*], he, the said defendant undertook, and then and there faithfully promised the said plaintiff to take due and proper care thereof, whilst the said defendant so had the care and custody of the same; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure and defraud the said plaintiff in this behalf, whilst the said defendant so had the care and custody of the said goods and chattels, took so little, and such bad and improper care thereof, that the same afterwards, to wit, on the day and year aforesaid, &c. (*venue*), aforesaid, became and were greatly damaged and injured, and wholly lost to the said plaintiff."

[*Add counts for money had and received and upon an account stated.*]

¹ 1 Chitt. Pl. 116. Case will not lie against an executor or administrator of a carrier, because it is in tort, and the plea is "not guilty," but assumpsit, which is another action for the same cause, will lie. Per Lord Mansfield, in *Hambly v. Trott*, Cowp. 375. And see 2 Greenl. Ev. § 208; *Patton v. Magrath*, 1 Rice, 162.

a count in trover, inasmuch as counts upon a promise and upon a tort cannot be joined.¹ But assumpsit is maintainable when trover will lie, as where the cause of action consists in a misfeasance, where, for instance, the carrier, instead of conveying the parcel according to his directions, transfers it to another carrier for that purpose, whereby the parcel is lost.² And trover even will lie against an executor for chattels continued *in specie* in his hands, the conversion being laid to have been by the executor.³

7. Distinctive Character of the Declaration.

§ 436. There has been a diversity of opinion not only as to the proper remedy in particular cases, but as to the distinctive feature in the declaration.⁴ The general rule, as we have seen, being that in actions *ex delicto*, the non-joinder of a co-defendant cannot be pleaded in abatement, it has, in England been a matter of doubt, whether such a plea would be good to a declaration framed in case, but founded on contract; and whether judgment could, as in actions founded on tort, be given for some defendants and against others.⁵ In *Weall v. King*,⁶ it was held, that an action on the case, alleging a deceit by means of a warranty, though laid in tort, was founded on contract.⁷

§ 437. In the case of *Pozzi v. Shipton*,⁸ the declaration contained no words of contract, but, on the other hand, it did not expressly aver that the defendants were carriers. The Court of King's Bench, however, were of opinion, that the declaration might be read as founded on the general custom of the realm, and consequently that a verdict which had been obtained against one defendant and in favor of the other was maintainable. The declaration, which was in case, stated that the plaintiff delivered to

¹ As was conceded in *Corbett v. Packington*, 6 B. & C. 268; 2 Saund. 117 *e*; 1 Chitt. Pl. 156.

² *Sleat v. Fagg*, 5 B. & Ald. 349.

³ *Hambly v. Trott*, Cowp. 373.

⁴ See opinion of Gibson, C. J., in *Smith v. Seward*, 3 Barr, 345; and, opinion of Lord Ellenborough, in *Govett v. Radnidge*, 3 East, 70.

⁵ But now in England (by Stat. 11 Geo. 4, and 1 Will. 4, c. 68, § 5), the

non-joinder of a co-defendant in assumpsit against common carriers, is no ground for pleading in abatement. Brown on Part. to Actions, 156.

⁶ *Weall v. King*, 12 East, 452.

⁷ This decision is recognized by the court in *Hunt v. Wynn*, 6 Watts, 47. And see *Pittsburgh v. Grier*, 22 Penn. State, 54.

⁸ *Pozzi v. Shipton*, 8 A. & E. 963.

the defendants, and they accepted and received from him, goods, to be taken care of and conveyed by the defendants from Liverpool to Birmingham, and there delivered to A., for the plaintiff, for reasonable reward, to the defendants in that behalf; and thereupon it became the duty of the defendants to take due care of such goods while they so had the charge thereof, for the purpose aforesaid; and to take due and reasonable care in and about the conveyance, and delivery thereof, as aforesaid; yet the defendants, not regarding their duty, &c., did not nor would take due care, &c., and that the goods were injured to the plaintiff's damage. At the trial it was proved satisfactorily, that the defendant, against whom the verdict was obtained, was a common carrier, and it was not objected at the time, that proof of an express contract was necessary in order to sustain the declaration. Under these circumstances, the Court of King's Bench refused to disturb the verdict, observing that, as the language of the declaration was consistent with the action, being founded on the general custom; and as there were no words of express contract, the court, after verdict, was bound to read it as founded on the custom; and that it was not then necessary to say, whether the want of an express averment that the defendants were common carriers for hire would have been good on special demurrer.¹(a)

§ 438. In an action on the case, in Connecticut, alleging that the defendants, being joint proprietors of a line of stage-coaches from Hartford to Albany, undertook, in consideration of a certain sum paid by the plaintiff, to transport him and his baggage from the former to the latter place, within a certain time specified; and that, having received the plaintiff and his baggage for that purpose, he detained the same on the road, and failed and neglected to perform their undertaking; it was held that the plaintiff could not recover against any of the defendants without proving a joint undertaking as alleged against all. Hosmer, C. J.,

¹ This case recognized in *Marshall v. York* R. 11 C. B. 655; 7 Eng. L. & Eq. 519.

(a) *Tattan v. Great Western R.* 2 Ellis & E. 844. In *Martin v. Great Indian R. L. R.* 3 Ex. 9, the plaintiff and his baggage were being carried under a contract between the government and the defendant. Held, that although the plaintiff could not sue on the contract of carriage, he was entitled to sue for an injury done to his property through the negligence of the defendant. See also *Hannibal R. v. Swift*, 12 Wall. 262.

who delivered the judgment of the court, refers to the established and obvious distinction between an action founded on contract, and one founded in tort ; and said that the plaintiff's action was founded on contract and the non-performance, without the allegation of misfeasance or malfeasance ; therefore, the plaintiff must, in every essential particular, prove the contract as he had alleged it.¹ In the case of *Patton v. Magrath*, in South Carolina,² the court considered, that whether the declaration be considered as strictly a declaration in assumpsit, or as a declaration in case *ex quasi contractu*, the plaintiff must sue all joint contracting parties, or the defendants may plead in abatement ; and that he must sue in the same action only the joint contractors, or he will fail at the trial.

§ 439. It has been asserted,³ that the case of *Corbett v. Packington*⁴ has put the law on the subject of the distinctive feature of the declaration on satisfactory ground, by making the presence or absence of an averment, not of promise only, but of consideration also, the criterion ; for it is impossible to conceive of a promise without consideration, any more than a consideration without a promise, as an available cause of action ; and when a consideration is not laid, the word “ agreed ” or “ undertook,” or even the more formal word “ promised,” must be treated as no more than inducement to the duty imposed by the common law. In *Smith v. Seward*, in Pennsylvania,⁵ it was expressly held, that an averment of a promise and a consideration, are both essential to a declaration in contract ; and that hence, a declaration averring an undertaking, in consideration that the public should be conveyed by means of defendant's ferry, and for hire, to receive and safely to convey, and that the plaintiff learning the said offer, did use the ferry, and commit his horse to defendant, in consideration of an undertaking to convey, was in tort.

8. As to the Allegations, &c., in the Declaration.

§ 440. Having endeavored to point out the difference between the two modes of proceeding against carriers on their liability to their employers, by action on the case and by the action of as-

¹ *Walcott v. Canfield*, 3 Conn. 194.

⁴ *Corbett v. Packington*, 6 B. & C.

² *Patton v. Magrath*, 1 Rice, 162. 268.

³ Per Gibson, C. J., in *Smith v. Seward*, 3 Barr, 342.

⁵ *Smith v. Seward*, *ub. sup.*

sumpsit, and to show the advantages peculiar to each ; and having given the form of declaring in each ;¹ it is now proposed to consider more in detail the allegations, &c., in declaring in each. It is laid down, that, though the remedy by action on the case against carriers is on some accounts preferable to assumpsit, yet the form of action does not materially affect the evidence necessary to maintain it.² The declaration in case must correctly state the contract, or the particular duty or consideration from which the liability results, and on which it is founded ; and a variance in the description of the contract, or the particular duty or consideration from which the liability results, and on which it is founded, though in an action *ex delicto*, may be as fatal as in an action in form *ex contractu*.³ As has been affirmed by a learned judge, “ in an action on a tort arising out of a contract, the statement of the contract is often as material as in an action on the contract ; and in either form of action, if the variance is on a point which goes to the very essence of the action, it is fatal.”⁴ As the inducement in declarations *ex delicto* relates to material matter, there will be a fatal variance, if, instead of relying on the general statement, the plaintiff enters upon a detailed statement, and there be a misdescription. As in an action for slander of a physician, even if it be not necessary in general for the party to show that he has regularly taken his degree, it is necessary if the party allege in his declaration, that he had duly taken the degree of doctor of physic.⁵

§ 441. But in torts, the plaintiff may prove a part of his charge if the averment be divisible, and there be enough proved to support his case. In a declaration, for instance, for slandering the plaintiff in two trades mentioned in the declaration, should there be proof of one trade only, the proof will support the declaration if the words apply to the latter trade.⁶ In respect to such divisibility there is, however, a material distinction between the statement of torts and of special contracts ; for in declaring upon the latter the contract must be stated correctly, and if the evidence

¹ Form in action on the case, *ante*, Bretherton v. Wood, 5 Brod. & B. § 429, n.; Form in the action of assumpsit, *ante*, § 435, n. 54.

² 2 Greenl. Ev. § 208. 1 Chitt. Johnson, 1 Bing. N. C. 162.

Pl. 161, 162, 7th ed. [125, 126].
³ 2 Greenl. Ev. § 208. 2 Steph. And see Rex v. Everett, 8 B. & C. 114.
N. P. 992. Max v. Roberts, 12 East, 89. Govett v. Radnidge, 3 East, 70. ⁶ Figgins v. Cogswell, 3 Maule & S. 369.

differs from the statement, the whole foundation of the action fails, because the action is entire in its nature, and must be proved as laid.¹ (a) A trivial variation is fatal, inasmuch as the contract given in evidence does not appear to be that on which the plaintiff declares;² and, therefore, where the declaration is on a promise to do several things, and one only is proved, there is a fatal variance. In an action of assumpsit against common carriers, the first count in the declaration alleged that the defendants undertook and promised the plaintiff to carry and convey securely, by their coaches and railroad cars, a trunk containing certain goods, &c., and bank-bills; but that they so carelessly conducted that the trunk and its contents were lost. The defendants moved a nonsuit, on the ground that there was a variance between the contract as stated in the declaration, and as proved on the trial; that the contract, as set forth, was to carry the trunk and money of the plaintiff, whereas it was proved that the trunk belonged to one M., a stranger. The court held, by Cowen, J., that the proof at most was of a contract with the plaintiff to carry the money only; and that the declaration failed in describing correctly a special executory contract, wherein great exactness is always demanded.³ So to allege a consideration for a promise, in addition to the true consideration, moving thereto, not supported by the proof, will be cause of nonsuit.⁴ The circumstance, that if assumpsit be adopted, the contract or promise must be formally stated in the declaration, and that in case it is otherwise, constitutes the principal difference between the two forms of action.⁵

§ 442. If the declaration in assumpsit state an absolute contract, and the proof is of a contract in the alternative, the plaintiff cannot recover, though he may have determined his option.⁶

¹ 1 Chitt. Pl. 334, 5th ed.

² Bull. N. P. 145. *King v. Pippet*, 1 T. R. 240.

³ *Weed v. Schenectady R.* 19 Wend. 534. As no injustice had been done by the mere formal addition of a "trunk" in the declaration, the court had no doubt, by an equitable construction of the law of New York

in respect to amendment, of their power to allow an amendment, by striking the "trunk" from the declaration.

⁴ *Stone v. Knowlton*, 3 Wend. 374.

⁵ *Samuel v. Judin*, 6 East, 333.

⁶ See 1 Chitt. Pl. 309; *Yelv.* 76, note by Metcalf; *Hilt v. Campbell*, 6 Greenl. 109.

(a) *Hughes v. Great Western R.* 14 C. B. 637; 25 Eng. L. & Eq. 347. *York R. v. Crisp*, 14 C. B. 527; 25 Eng. L. & Eq. 396. *Slim v. Great Northern R.* 14 C. B. 647; 26 Eng. L. & Eq. 297.

Where it appears by the terms of the contract, for the breach of which the action is brought, it was at the option of the defendant to deliver this or that quantity of goods at one time, and the remainder at another, it ought to be thus stated.¹ Where a contract was in the alternative to transport fifteen or twenty tons of marble from one place to another, it must be stated in the declaration according to the terms of it; and if it be stated as an absolute contract, for the transportation of twenty tons, and not fifteen or twenty tons, the variance is fatal.²

§ 443. In an action of special assumpsit against the defendant, as the master of a ship, for not safely conveying goods to a foreign port, consigned to the plaintiffs, evidence that the goods were seized in another port by the government, coupled with a letter of the defendants, in which he acknowledged that he was accountable for the goods, is sufficient to warrant the jury to find for the plaintiffs, without any further proof of the cause of seizure. For the defendant, it was however objected, that there was a variance between the bill of lading and the declaration, and between the undertaking as laid in the first two counts and the breach assigned, the undertaking being laid to deliver for the plaintiffs at the island of Batavia, and the breach being that the defendant did not deliver to the plaintiffs. But Chief Justice Abbott said he would not nonsuit the plaintiffs upon this objection.³

§ 444. A declaration upon a promise alleging that the defendant undertook to deliver a parcel of goods for the plaintiff, is disproved by evidence of a special agreement to deliver them to the bearer of a receipt given for the goods at the time of the delivery. But if the declaration had been in trover, the plaintiff would have been entitled to recover, since the delivery of the goods to another amounted to a conversion.⁴

§ 445. The declaration may be on an executed consideration, in consideration of plaintiff having delivered the goods.⁵ Thus, where a count in a declaration against a carrier by water, alleged, that in consideration that the plaintiff, at the request of the defendant, had caused to be shipped on board the defendant's vessel a quantity of wheat, to be carried to a certain place for freight, to be therefore paid to the defendant, he undertook to carry the wheat

¹ Penny v. Porter, 2 East, 2. And see Yate v. Willan, 2 East, 134.

² Stone v. Knowlton, 3 Wend. 374.

³ Cullen v. M'Alpine, 2 Stark. 552.

⁴ Samuel v. Darch, 2 Stark. 60.

⁵ 2 Steph. N. P. 991.

safely, and deliver it for the plaintiff on a given day; but it appeared, that the defendant's undertaking to carry was made before the whole of the wheat had been shipped on board the vessel; it was held, that the count might be supported, although it was objected that the consideration for the promise was executory.¹

§ 446. It is enough to allege in the declaration against a carrier for the loss of goods, that the consideration of their conveyance was of a certain reward, or of reasonable hire and reward, without stating what reward.² In the precedent in *Dalston v. Janson*,³ the allegation is only that the carrier was to carry "for a reward to be therefore had." (a) In *Clarke v. Gray*⁴ this general form of alleging the consideration in declaring in actions against carriers was sustained, after much deliberation, though it was proved that the carrier had limited his responsibility by a notice to a certain sum, unless goods above that value were entered and paid for accordingly. The declaration in this case was in assumpsit in the usual form; and it was held, that the notice in question amounted only to a limitation of damages, after a right to them had accrued by a breach of the contract, and was proper to be given in evidence to the jury in reduction of damages; but that it formed no part or qualification of the original contract for carriage; and that, consequently, it was not necessary to be shown to the court, in the first instance, on the face of the record.⁵ But if the provision be of such a nature as goes in discharge of the liability of the party under the contract altogether, in case a particular condition is not complied with, as where goods were not to be accounted for at all, unless properly entered and paid for; that will operate not merely in reduction of damages, but in bar of the action.⁶ So if the car-

¹ *Streeter v. Horlock*, 7 Moore, 283; 1 Bing. 34.

² *Taylor v. Wells*, 2 Saund. 74 a. 2 Chitt. Pl. (7th ed.) 337, n. (c). 2 Steph. N. P. 994.

³ *Dalston v. Janson*, 1 Ld. Raym. 58.

⁴ *Clarke v. Gray*, 6 East, 564.

⁵ Lord Ellenborough in this case said, that a conflicting decision in *Yate*

v. Willan, 2 East, 128, could not be supported in its full extent.

⁶ *Clay v. Willan*, 1 H. Bl. 298. The general doctrine on the subject is stated by Lord Ellenborough to be, that it is sufficient to state in the declaration so much of any contract, consisting of several distinct parts, and collateral provisions, as containing the entire consideration for the

(a) In case against a carrier it is not necessary to allege that a compensation was paid or agreed to be paid. *Hall v. Cheney*, 36 N. H. 26.

rier except his liability from loss occasioned by fire or robbery, it must be stated in the declaration.¹ Abbott, C. J., says: "The result of all the cases is, that if the carrier only limits his responsibility, that need not be noticed in pleading; but if a stipulation be made that under circumstances he shall not be liable at all, that must be stated."² Declaration in case stated that the defendants were proprietors of the Y. & N. M. Railway Company, and of certain carriages for the conveyance of passengers, cattle, and goods and chattels upon the said railway for hire; that they received nine horses of the plaintiff to be safely and securely carried in the carriages of the defendants by the railway for hire; and that thereupon it was the duty of the defendants safely and securely to carry, and convey and deliver the horses of the plaintiff; and then averred the loss of one by reason of the insufficiency of one of the carriages. It appeared, that when the horses were received, a ticket was given to the plaintiff stating the amount paid by the plaintiff for the carriage of the horses, and the journey they were to go, and having at the bottom the following memorandum: "This ticket is issued subject to the owner's undertaking all risks of conveyance whatever, as the company will not be responsible for any injury or damage, however caused, occurring to horses or carriages, while travelling, or in loading or unloading." It was held, that the terms contained in the ticket formed part of the contract for the carriage of the horses; and that the alleged duty of the defendants safely and securely to carry and convey the horses did not arise upon that contract. "It may be," said Lord Denman, C. J., "that, notwithstanding the terms of the contract, the plaintiff might have alleged that it was the duty of the defendants to have

act, and the entire act which is to be done in virtue of such consideration; and that the rest of the contract, which only respects the liquidation of damages, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the jury in reduction of damages, but not necessary to be shown to the court in the first instance on the face of the record. *Clarke v. Gray, ub. sup.*

¹ *Latham v. Rutley*, 2 B. & C. 20. In this case the action was *assumpsit*, that, for a certain hire and reward, the defendants undertook to carry goods from, and deliver them safely at Dover; and the contract proved was, to carry and deliver safely (fire and robbery excepted); it was held, that this was a variance.

² *Latham v. Rutley, ub. sup.*

furnished proper and sufficient carriages, and that the loss happened from a breach of that duty; but the plaintiff has not so declared, but has alleged a duty which does not arise upon the contract, as it appeared in evidence.”¹ (a) It was said that the stipulations proved by the defendants in this case at the trial did not alter the effect of the contract stated in the declaration; and that, notwithstanding the stipulation, the defendants were liable for the accident which happened to the horse; and *Lyon v. Mells*² was cited. But what was proved there was only a notice, and a general notice; but in the case in question the note proved was proved to contain the terms of a special contract entered into between the plaintiff and the defendants with respect to the acceptance of a particular kind of goods.

§ 447. If no special executory contract is relied on, it is not necessary to be minute in alleging the quantity or quality of the goods to be conveyed;³ or, at least, they may be stated with a less degree of certainty and accuracy than is required in an action of detinue or of replevin.⁴ The law does not now, as formerly, require in the action of trover great precision and certainty in the description of the goods; and if the description is according to common acceptance, it is sufficient. Thus, trover for “a suit of knots” has been held sufficiently certain; or, for “a parcel of thread,” without mentioning the quantity of it; such allegation being certain enough where damages only are to be recovered, and not the thing itself.⁵ So the declaration against a carrier for the loss of goods need only state the nature of the goods with a certainty of description to a common intent; and, therefore, a carrier’s pack has been held a sufficient certainty;⁶ and so, where the declaration was for so many sets of “gold buttons,” and a set of “Turkey stones and garnets;” for, to such as are conversant with those things, a set is intended to be well known,

¹ *Shaw v. York R.* 13 Q. B. 347.

⁴ *Taylor v. Wells*, 2 Saund. 74 a.

² *Lyon v. Mells*, 5 East, 428.

⁵ *Ibid.* n. (1) and cases therein

³ 2 Chitt. Pl. n. (d) to p. 757 cited.

(7th ed.).

⁶ *Jeremy on Carr.* 123.

(a) *White v. Great Western R.* 2 C. B. (N. S.) 7; 40 Eng. L. & Eq. 255. *Austin v. Manchester R.* 16 Q. B. 600; 5 Eng. L. & Eq. 329. *Kimball v. Rutland R.* 26 Vt. 247. See *Simons v. Great Western R.* 2 C. B. (N. S.) 620.

and in what manner the precious stones are usually placed in such sets.¹

§ 448. In case against a carrier, where the duty was alleged to be, safely to convey and deliver, the grievance may be stated to be non-delivery within a reasonable time.² (a) The pleas in the case referred to, were first, "not guilty;" secondly, "that the plaintiff did not deliver to the defendants, nor did the defendants receive from the plaintiff, the goods in the declaration mentioned, to be carried and delivered for the plaintiff by the defendants, *modo et forma*;" concluding to the country; and issue thereon. The jury returned a verdict for the plaintiff, and a rule *nisi* was

¹ Ibid., referring to Chamberlain v. Cooke, 2 Vent. 78; and Herbert v. Lane, Style, 370.

² Raphael v. Pickford, 5 Man. & G. 551, and see *ante*, § 284. As to the form of the declaration in such case: The declaration stated, that on the 1st of August, 1842, the defendants were common carriers of goods for hire from London to Birmingham, and then proceeded to state, in the usual form (see *ante*, § 429), the delivery of the goods to the defendants to be carried for hire, and to be delivered, and their duty safely to carry and deliver, and then averred, "that a reasonable time for the defendants' carrying and conveying and delivering the said goods as aforesaid elapsed before the commencement of the suit;" breach, "that the defendants, neglecting their said duty in that behalf, did not safely and securely carry and convey the said goods from London to Birmingham aforesaid, or at Birmingham aforesaid safely or

securely deliver the same for the plaintiff, but then so negligently and improperly behaved and conducted themselves, that, by and through the negligence, carelessness, and default of the defendants in the premises, the said goods, then and before the commencement of the suit, became and were and are totally lost to the plaintiff; and, by reason of the premises, the plaintiff was before the commencement of the suit necessarily detained in Birmingham aforesaid, and obliged to waste and consume his time, to wit, eight days from the day and year aforesaid, in and about attempting to procure the delivery to him of the said goods; and he thereby also lost great profits, to wit, profits to the amount of £5, which he would have derived from the delivery of the said goods, if they had arrived in Birmingham aforesaid, to divers persons to whom the plaintiff had sold the same," &c.

(a) In Peck v. Weeks, 34 Conn. 145, the declaration alleged a delivery of boxes of poultry to the defendant, and his receipt of the same to carry to New York on that day; that he did not proceed to New York on that day nor within a reasonable time afterwards, "but so negligently conducted himself in this behalf, that said poultry were not conveyed to New York and delivered there until the same, in consequence of such negligence, became spoiled. Held (two judges dissenting), a sufficient averment of negligence in the care of the poultry.

obtained for entering a nonsuit. The court, said Tindal, C. J., would first consider the allegation of the defendants' duty, and secondly, the allegation of the breach. He then proceeds to say: "It was not denied that, if the action had been brought for the total loss of the parcel, and the evidence had shown that it had never been delivered, the plaintiff would have been entitled to recover upon the declaration as now framed; and if so, then it necessarily follows that the evidence given as to the contract and duty of the defendants would prove the duty as laid. Neither could it be denied, that if it had been alleged to be the defendants' duty to deliver within a reasonable time, the same evidence would have been sufficient to support that allegation, the duty to deliver within a reasonable time being merely a term ingrafted by legal implication upon a promise or duty to deliver generally. No valid objection, therefore, exists to the proof of duty as alleged. Whether such allegation would have been good upon special demurrer, if the only breach had been the non-delivery within a reasonable time, is another question, not material to our present inquiry. But it is said, no such breach is alleged in this declaration, and yet that is the only breach supported by the evidence. But we think that the breach in this declaration may be read as in effect stating that the defendants did not within a reasonable time, or at any time afterwards, deliver the goods to the plaintiff. And if the breach had been so in form, it would have been sufficient for the plaintiff to prove so much of the breach as would support his right of action; and as the onus of proving the delivery would rest upon the defendants, unless they proved a delivery within a reasonable time, the plaintiff's right of action, and, consequently, the breach alleged, would be established. We are, therefore, of opinion that the plaintiff is entitled to retain his verdict."

§ 449. A material variance between the allegation in the declaration and the evidence of the termini, is fatal. Thus, where the conveyance of goods was averred to be from W., in the county of Middlesex, to T., in Essex, but the contract proved was for a conveyance of goods from Aldgate to the city of London, the variance, it was held, was fatal.¹ But an averment of a contract to carry goods from London to Bath, is supported by evidence of

¹ *Tucker v. Cracklin*, 2 Stark. 385.

a contract to carry from Westminster to Bath ; for the reason that London must be taken in the enlarged and popular sense of a collective name, and not in a limited sense, applicable to what is strictly the city.¹ Indeed, if the evidence as to the termini supports substantially the allegation in the declaration, and is not inconsistent with it, there is no variance. As another instance : the plaintiff alleged, that defendant, having agreed to convey her safely by his coach from London to Blackheath, neglected his duty by permitting the horses to move on while she was getting up, whereby she was thrown down and injured ; it was held to be no variance, that the defendant's coach ran from Charing Cross to Blackheath, and that the plaintiff got up at the Elephant and Castle ; though the defendant had inscribed on his coach " London to Blackheath." The agreement was construed by the court according to the intention of the parties, by which London was to be understood, not the city, strictly speaking, but what is usually called London. If Westminster, said Best, C. J., be included in a place in common parlance styled London, even with its separate jurisdiction, *à fortiori* might the Elephant and Castle be included, which is nearer to the city than Westminster.² Again, as the gist of the action is the non-delivery at the place the thing should go to, the terminus *a quo* is immaterial.³ In case the declaration stated, that the plaintiff delivered a trunk to the defendant to be put into a coach at Chester, in the county of Chester, to wit, at, &c., and safely to be carried to Shrewsbury, and that, through the defendant's negligence, it was lost. It appeared in evidence, that the trunk was delivered to the defendant at the city of Chester, which is a county of itself, separate from the county of Chester at large, but within its ambit ; and it was held, that this was not a material variance, but that the declaration was supported by the evidence ; as no evidence was given of any other place called " Chester." ⁴ (a)

¹ Beckford v. Crutwell, 5 Car. & P. 242.

² Ditcham v. Chivis, 4 Bing. 706.

³ Woodward v. Booth, 7 B. & C. 301.

⁴ Ibid. This, and the other cases which have been cited, show that a

trifling variance as to the description of the termini, or one not calculated to mislead, is immaterial. The general rule, indeed, in respect to variance, as was stated by Bayley, J., in Wicks v. Gordon, 2 B. & Ald. 335, is, that a contract must be stated

(a) See Mann v. Birchard, 40 Vt. 326.

§ 450. An averment that the defendant so "carelessly and negligently behaved and conducted himself," is a sufficient averment to admit proof of gross negligence;¹ but an allegation that the servants of the defendant negligently "drove, conducted, and managed the coach," is not supported by proof of negligence in sending out an insufficient coach.²

9. Pleading.

§ 451. The difference between an action on the case for a tort against carriers, and an action of assumpsit, or an action directly on the contract, is clearly shown by the pleadings; the general issue in the former form of action being "not guilty," and in the latter, "non-assumpsit."³ As most matters of defence against common carriers to actions on the case may be given in evidence under the general issue, it has been considered that it is seldom advisable to resort to a special plea.⁴ A plea not consisting of matter of excuse may amount to the general issue without the formality of the words "not guilty." In a declaration in case against the Grand Junction Railway Company,⁵ for the loss of goods delivered to them as common carriers, to be safely and securely carried and conveyed; it was pleaded that the delivery and receipt of the goods were and happened after 4 Will. 4, c. 4, and that, at the time of such delivery the plaintiff became and was a passenger by the railway, and that the goods were delivered to be

according to its legal operation, and if the evidence proves it according to that legal operation, it is sufficient. In *Burbidge v. Jakes*, 1 Bos. & P. 225, the declaration stated, that the plaintiff was possessed of a messuage at Sheerness. At the trial, it was proved that the house stood in the parish of Minster, which is contiguous to Sheerness, and usually goes under that name; the variance was held to be immaterial. The proof, in *Drewry v. Twiss*, 4 T. R. 558, that the defendant's boat ran down the plaintiff's in the half-way reach in the Thames, was held to support an allegation, that the boat was run down in the Thames near the half-way reach. In an action for negligence, *Best*,

C. J., in *Ditcham v. Chivis*, *ub. sup.*, observed, that he "had no objection that it should be said of me that I always entertained a strong impression against deciding on the ground of variance;" but he added, "that impression will never induce me to overturn the law."

¹ *Smith v. Horne*, 8 Taunt. 144. See *ante*, § 38 *et seq.*

² *Mayor v. Humphries*, 1 Car. & P. 251.

³ 1 Chitt. Pl. 89, 122. 2 Chitt. Pl. 332. *Zell v. Arnold*, 2 Penn. 293. *M'Call v. Forsyth*, 4 Watts & S. 179.

⁴ See opinion of Cowen, J., in *Hoyt v. Allen*, 2 Hill, 322.

⁵ *Elwell v. Grand Junction Railway Co.* 5 M. & W. 669.

conveyed with him as such passenger, and that no part thereof were articles of clothing of the plaintiff. To this plea there was the general replication *de injuria*. On special demurrer, it was held, that the replication was ill, inasmuch as the plea did not consist of matter of excuse, but amounted to the general issue, being an argumentative traverse, that the goods were delivered to the defendants as common carriers.

§ 452. It is not competent, in an action on the case against a carrier, under the plea of “not guilty,” to set up as a defence that the plaintiff misrepresented the weight of the goods which the defendant agreed to carry; the plea operating only as a denial of the loss or damage, and not of the receipt of the goods by the defendant; and the defendant ought to plead the misrepresentation specially, or traverse the acceptance of the goods for the purpose of being carried.¹

§ 453. The defendant, in the above case, went to trial with an admission that certain goods were put into the carrier’s van for the purpose of being safely carried from Maidstone to London, and that he received them for that purpose. At the trial the defendant attempted to set up as a defence, that the plaintiff had misrepresented the weight of the goods, and had put into the van a larger quantity of goods than the defendant was aware of, and, therefore, that the injury was occasioned by the wrongful act of the plaintiff himself. The defendant, it was held, should have pleaded that he was induced by the misrepresentation of the plaintiff to take a greater load than the van could safely carry; the plaintiff should have notice of the defence on which the defendant means to rely. But in an action on the case for negligence, where the plaintiff is contributory to the mischief of which he complains, the defence, under the plea of “not guilty,” is admissible.²

§ 454. A plea of a notice that the carrier would not be responsible, &c., to a count in trover in an action on the case, has been held bad, as admitting a conversion by inadvertent delivery. The first count in a declaration in an action on the case against carriers, stated a delivery to the defendants, at their request, of a case containing certain maps to be carried, and alleged a receipt thereof by the defendants, whereby it became their duty to take due and

¹ Webb v. Page, 6 Scott, N. R. 951;
6 Man. & G. 196.

² Holden v. Liverpool Gas Co. 3
C. B. 1.

proper care thereof; but that they did not do so, whereby the goods were lost. The second count was in trover. Plea to the first count that, at the time of the delivery of the case and its contents, the defendants were common carriers for hire, and then gave notice to the plaintiff, who then had notice and knowledge, that the defendants would not be responsible for the loss of, or damage done to, certain goods and chattels delivered to them for the purpose of carriage, and, amongst others, maps in packages or otherwise, unless the same were insured according to their value, and paid for at the time of delivery; that the said case was the package in which the said maps were contained; that they received the case and maps to be carried as aforesaid, upon the terms and conditions of the said notice, and upon no other terms whatsoever, of which the plaintiffs at the time of delivery had notice, and that the maps at the time of the delivery were not insured according to their value, or paid for. To the count in trover there was a similar plea, alleging the conversion to have been by a mis-delivery, through mistake and inadvertence. On special demurrer to both pleas, it was held first, that the action being founded on a breach of duty *ex contractu*, the allegation in the pleas of a special contract was sufficient; and that, as the defendants accepted the goods only on the terms of the notice, a special averment of the plaintiff's consent was unnecessary. Secondly, that the third plea was not an argumentative traverse of the facts in the declaration, from which the breach of duty was implied. Thirdly, that as the declaration might apply to any kind of negligence, it was not necessary to allege in the third plea, that the loss was occasioned by such negligence as the defendants were not responsible for; and that if the defendants had committed negligence for which they were liable, notwithstanding their notice, the plaintiff should have now assigned. Fourthly, that the case was not separable from the maps. Fifthly, that the plea to the count in trover could not be supported, inasmuch as it admitted a conversion by inadvertent delivery, and did not show that the inadvertence was such as was protected by the notice. "There is a difficulty," said Parke, B., "in supporting that plea, on the construction which we think ought to be put on the terms of the notice on which the goods were received, for the plea admits a conversion by inadvertent delivery; and does not excuse that, since the carrier is not by such notice made irresponsible for every

mistake or inadvertent delivery, but only for such as were made without negligence, whether gross or ordinary, and a delivery may be even grossly negligent, which is inadvertent.¹

§ 455. In actions of assumpsit, against carriers and all other bailees for not delivering or not keeping goods safe, or not returning them on request, the plea of “non-assumpsit” will operate as a denial of any contract to the effect alleged in the declaration, and of “such bailment as would raise a promise in law to the effect alleged in the declaration.” In *Dale v. Hall*,² the declaration, which was against common carriers by sea, was founded in assumpsit, to which there was the plea of “non-assumpsit.”

§ 456. The fact in issue under the plea of “non-assumpsit,” is whether any such contract as alleged was made; and the plaintiff must prove that it was, by showing that the defendant made it himself, or, if the captain of a vessel made it, that he was the defendant's agent. A declaration in assumpsit stated that the defendants were the owners of a vessel lying in a certain river, and bound to Liverpool; that the plaintiff caused to be shipped on board a quantity of potatoes, to be safely carried by the defendants, as owners of the said vessel, to Liverpool; and in consideration thereof, and of a certain freight, the defendants promised the plaintiff to take proper care and safely carry the said goods as with a breach, that through the defendants' negligence they were damaged. The ownership of the defendants, it was held, was not admitted by the plea of “non-assumpserunt.”³ In *Patton v. Magrath*, in South Carolina⁴ (action of assumpsit), the declaration counted upon a joint contract by the defendants to carry fourteen bales of cotton from Hamburg to Charleston, in a steamboat, of which the defendant Magrath was owner, and the other defendant, Brooks, master; and alleged a loss of the cotton by negligence. The evidence of the contract was a bill of lading, signed by the said Brooks, the master, only. It was held, that the contract was several, and that the defendants were improperly joined.

§ 457. In assumpsit against the defendant as a common carrier

¹ *Wyld v. Pickford*, 8 M. & W. 443.

² *Bennion v. Davison*, 3 M. & W.

³ *Dale v. Hall*, 1 Wils. 282.

179.

⁴ *Patton v. Magrath*, 1 Rice, 162.

to recover the value of goods delivered to him, to be taken care of, and to be safely delivered by him, as such carrier, in his cart, from N. to B., and there safely to be delivered by him to the plaintiff, but which by negligence were lost; it was pleaded, that when the defendant received the goods, an express condition and agreement was made between him and the plaintiff, that the plaintiff should accompany the cart, and watch and protect the goods from being lost or stolen, but that he neglected and refused so to do, and by reason whereof, and not by any negligence of the defendant, the goods were lost. It was held, that this plea was bad on special demurrer, as amounting to the general issue.¹

§ 458. To a declaration on a contract, by a bill of lading, by the master of a vessel, to convey goods from Dublin to London, and to deliver the same at the port of London to the plaintiff or his assigns, a plea, that after the arrival of the vessel at London, the defendant caused the goods to be deposited on a wharf, there to remain until they could be delivered to the plaintiff, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes, and that before a reasonable time for delivery elapsed, they were destroyed by a fire which broke out there by accident, was held ill. The defendants were responsible both for taking care of the goods at the wharf, and for carrying the goods from the wharf; inasmuch as both these duties formed a part of the same express contract, and are paid for by the same reward; and the master, during the whole of the time while the goods are in his possession, is under the obligation of a common carrier. It is, therefore, obvious, the plea in question could furnish no answer to the loss of the goods by fire at the wharf; a common carrier by the well-known rule of law being liable for every loss (not specially excepted) except the act of God and the public enemy.²

§ 459. In assumpsit upon an undertaking to carry goods in the defendant's ship to Canton, and to deliver them to the plaintiff's agent there, it was pleaded that the ship proceeded near the port of Canton, but was prevented by the chief superintendent of trade, and the commander of the naval forces there, from entering that port. This plea, on special demurrer, was held bad, for

¹ *Brind v. Dale*, 2 M. & W. 775. 314. And see the case cited more

² *Gatliffe v. Bourne*, 4 Bing. N. C. fully, *ante*, § 299.

not sufficiently disclosing that those officers had authority to act in the manner alleged; the authority should have been stated on the face of the plea.¹

§ 460. Whether the form of action against carriers be considered as founded in contract or in tort, the remedy by action on the case or assumpsit still falls within the general class of actions, which, in the statute of limitations, are called “actions upon the case,” and must, therefore, be prosecuted within the period prescribed from the time the cause of action accrued.² The pleas of the statute in assumpsit are *non assumpsit infra sex annos*, and *actio non accrevit infra*, &c.; the latter being considered the preferable mode of pleading the statute in assumpsit; as it also is to be preferred to the plea of “not guilty within six years,” if the action is an action on the case for a tort; as the action may be for the consequences of the act originating the tort. Although it may be held that the cause of action arises immediately on the default, yet there may be sometimes an uncertainty in respect to the precise time at which the default should be fixed.

10. Evidence.

§ 461. We have seen that in an action against carriers for negligence or improper conduct, in respect of the carriage of goods, the declaration is founded in tort for a breach of duty, or in assumpsit for breach of contract; and it is necessary to prove in either case, 1st, a contract implied or expressed; 2dly, the delivery of the goods;³ and 3dly, the defendant’s breach of duty or promise.⁴

§ 462. First, the action is founded either on an implied contract, or upon an express and special contract. It has already appeared that where the latter sort of contract exists, it must be relied on and proved, as it cannot be implied.⁵ It is usual for the plaintiff to rely on an implied contract, when by evidence it appears that the defendant is a common carrier, as alleged in the declaration;⁶ for if he is a common carrier the law supplies the proof of the contract so far as respects the extent and degree of

¹ *Evans v. Hutton*, 4 Man. & G. 954.

² *Jeremý on Carr.* 133. *Angell on Limit.* 73.

³ See, *ante*, Chap. V.

⁴ 2 Stark. Ev. 331.

⁵ *Ante*, § 441 *et seq.*

⁶ See *ante*, § 429.

his liability.¹ As to the evidence necessary to show that a person is a common carrier, there is no occasion to recapitulate the much that has already been offered in a former chapter, in respect to what must appear, in order to subject a person to the responsibility of one acting in that capacity.² (a)

§ 463. Evidence, that at the door of a booking-office there is a board on which is painted, "conveyances to all parts of the world," and a list of names and places is not sufficient proof of itself that the owner of the office is a common carrier, so as to charge him for the loss of a box which was booked there; and he cannot be declared against as carrier. Lord Tenterden, C. J., said: "We know there are in this town (London) booking-offices that do not belong to the carriers; and I am of opinion that you cannot convert the keeper of a booking-office into a carrier." The plaintiff wished to go on the count he had in his declaration in trover, but it being proved, on the part of the booking-office keeper, that his porter delivered the box in question in due course to one H., who was a Windsor carrier, the plaintiff was nonsuited.³ But if it be proved that a carrier gave directions to have goods sent to a particular booking-office, he is then responsible for the negligence of the office-keeper.⁴

§ 464. If the defendant is not a common carrier it is necessary to prove what the terms of the defendant's undertaking were;⁵ and by the terms of his undertaking he may put himself into the situation of, and incur the responsibility of, a common carrier, as by his special warranty.⁶ A carrier's receipt for goods is of course evidence of a contract between him and the owner;⁷ (b) and the substance of a bill of lading is a formal acknowledgment of the receipt of goods and an express engagement to deliver to the consignee, or his assigns.⁸ In a declaration in assumpsit against a

¹ 2 Greenl. Ev. 210.

² *Ante*, Chap. IV.

³ *Upston v. Slark*, 2 Car. & P. 598. And see *Newborn v. Just*, 2 Car. & P. 76; *Gilbert v. Dale*, 1 Nev. & P. 22; and *ante*, § 69.

⁴ *Ante*, § 135.

⁵ 2 Stark. Ev. 332. *Ante*, §§ 59, 60.

⁶ *Robinson v. Dunmore*, 2 Bos. & P. 417; the facts in which are given in detail, *ante*, § 59.

⁷ *Samuel v. Darch*, 2 Stark. 60.

⁸ *Ante*, §§ 223-232, 398, *et seq.*

(a) See *Ringgold v. Haven*, 1 Calif. 108.

(b) If the receipt given states merely the receipt of the goods, parol evidence of the contract made may be given. *McCotter v. Hooker*, 4 Seld. 497.

common carrier by water, for the non-delivery of a certain quantity of salt and steel which he had received to transport, it was held that a bill of lading in which the defendant acknowledged the receipt, not only of the salt and steel, but also of certain other articles, was not objectionable as evidence on the ground of variance.¹ (a)

§ 465. Secondly, of delivery. The responsibility of a carrier attaches upon the delivery to him of the goods to be forwarded, and if accepted, without evidence of any special agreement as to reward. What is sufficient evidence of a delivery and the consequent responsibility has already been considered;² and it has appeared that it is sufficient to prove a delivery to a duly authorized agent of the carrier, as, to the master of a vessel, or, to one driving the coach or wagon on the course of conveyance.³ It is sufficient for the plaintiff to show that a parcel was delivered to a person and at a house where parcels were in the habit of being left for the carrier; and the person who so left the parcel may be asked on cross-examination, in an action for the loss, what direction was on the parcel.⁴ In order to show a delivery, notice should be given to the defendant to produce his book of entries and way-bill, if any; and he should also prove what orders were given at the time of delivery, as to the carriage of the goods, and the direction written upon the box or package.⁵

§ 466. If it be proved that one common carrier has received goods from another carrier, to whom they were at first delivered by the owner for carriage, he may become liable to the owner as common carrier. (b) Where A agreed with B, a common carrier, for the carriage of goods, and B, without A's directions, agreed for the carriage with C, who, without A's knowledge, agreed with

¹ *Wallace v. Vigus*, 4 Blackf. 260. 680, cited in Lond. Law Mag. for

² *Ante*, Chap. V. Nov., 1848.

³ *Ante*, §§ 146, 147.

⁵ 2 Stark. Ev. 200. 2 Greenl. Ev.

⁴ *Burrell v. North*, 2 Crompt. & K. § 213.

(a) A receipt given by the consignees of goods to the carrier, acknowledging their receipt in good order, and in which the consignees are requested to notice any errors therein in twenty-four hours, or the carrier will consider himself discharged, does not estop the consignor from suing the carrier for damages caused by negligence in transporting the goods, although no notice was given thereof to the carrier. *Sanford v. Housatonic R.* 11 Cush. 155.

(b) *Wing v. New York R.* 1 Hilton, 235.

D, a third carrier; it was held that A might maintain an action against D for not delivering the goods; and that, by bringing the action, A affirmed the contract made with D by C, and could not afterwards recover from B.¹ Where it appeared that the goods were delivered to an express forwarder, and that he delivered them over to a steamboat company, who acted as common carriers, to be transported; this evidence was held to support an action brought directly against the latter, with whom the contract was to be deemed to have been made through the agency of the express forwarder; the contract with the steamboat company being ratified by the owner of the goods by his bringing the action against them.² (a)

§ 467. Thirdly, as to proof of loss. The letter of a carrier may be used as evidence against him, that the loss was in consequence of his default;³ (b) and also in proof of the loss, the declaration of the defendant's coachman, or driver, in answer to an inquiry made of him for the goods, is competent evidence for the plaintiff.⁴

§ 468. A declaration of the carrier himself, that the property in his custody for conveyance was lost by accident or stolen from him, accompanied with a narration of all the circumstances accompanying the loss, it has been held, ought to be admitted as part of the case, so as to entitle the carrier to the benefit of the statement at the trial, as a part of the *res gestæ*. But it is with the qualification that the jury is at liberty to disbelieve the statement or to trust to it, according, as in their judgment, the whole circumstances do, or do not, repel the presumption of negligence.⁵

¹ Sanderson v. Lamberton, 6 Binn. 129.

² New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344.

³ Cullen v. M'Alpine, 2 Stark. 552.

⁴ 2 Greenl. Ev. § 213. Mahew v. Nelson, 6 Car. & P. 58.

⁵ Tompkins v. Saltmarsh, 14 S. & R. 275, cited more fully, *ante*, § 40. And see the other cases there referred to. Beardslee v. Richardson, 11 Wend. 25. Surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury, along

(a) Where goods are to be carried over several connecting lines under such circumstances that each carrier is only liable for loss occurring on his own line, and an action is brought against the first carrier, it is sufficient to establish a *prima facie* right to recover for the loss of the goods to show that they were delivered to him, and that they have not arrived at the place of final destination. Brintnall v. Saratoga R. 32 Vt. 665.

(b) See Fox v. Adams Exp. Co. 116 Mass. 292.

The principal points of attention are, whether the declarations, with the circumstances offered in proof, were contemporaneous with the main fact under consideration, and whether they were so connected as to illustrate its character.¹ It was said by Hosmer, C. J., in *Enos v. Tuttle*,² that “declarations, to become a part of the *res gestæ*, must have been made at the time of the act done, which they are supposed to characterize; and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them, as obviously to constitute one transaction.”³ (a)

with the principal fact. *Rawson v. Haigh*, 2 Bing. 104. *Ridley v. Gyde*, 9 Bing. 349. *Pool v. Bridges*, 4 Pick. 378. *Allen v. Duncan*, 11 Pick. 308. That a party's own declarations may be given in evidence, if they are a part of the *res gestæ*, see *Millikin v. Greer*, 5 Missis. 429; *Postern v. Postern*, 3 Watts & S. 127; *Stitt v. Wilson*, Wright, 505; *Redden v. Spruance*, 4 Harring. Del. 216; *In re Taylor*, 9 Paige, Ch. 611.

¹ 1 Greenl. Ev. § 108.

² *Enos v. Tuttle*, 3 Conn. 250.

³ See opinion of Duncan, J., *ante*, § 40. Against a private carrier charged with the loss of goods by negligence, the common declaration in assumpsit is as follows: “For that on —, in consideration that the plaintiff at the request of the said (*defendant*) had delivered to him certain goods and

chattels, to wit [here describe them], of the value of —, to be safely conveyed by him from — to —, for certain reward to be paid to the said (*defendant*), he, the said (*defendant*), promised the plaintiff to take good care of said goods, while he had charge of the same, and with due care to convey the same from — to — aforesaid, and there safely to deliver the same to the plaintiff (or to —, as the case may be). Yet the said (*defendant*) did not take due care of said goods while he had charge of the same as aforesaid, nor did he with due care convey and deliver the same as aforesaid; but on the contrary, so carelessly and improperly conducted in regard to said goods, that by reason thereof they became and were wholly lost to the plaintiff.” 2 Greenl. Ev. n. (2) to § 210.

(a) In an action against a railroad corporation by a passenger for the loss of his trunk, the admissions of the conductor, baggage-master, or station-master as to the manner of the loss, made in answer to inquiries in behalf of the passenger the next morning after the loss, are admissible in evidence against the corporation. *Morse v. Conn. River R.* 6 Gray, 450. See also *Burnside v. Grand Trunk R.* 47 N. H. 554; *Lane v. Boston & Albany R.* 112 Mass. 455; *Gott v. Dinsmore*, 111 Mass. 45; *Kirkstall Brewery Co. v. Furness R. L. R.* 9 Q. B. 468. In *Norwich Tr. Co. v. Flint*, 13 Wall. 3, a passenger on a steamboat was injured by the discharge of a musket by one of a company of soldiers who were also passengers. *Held*, that evidence was admissible, as part of the *res gestæ*, that before the shot was fired notice was given to one of the officers in the cabin by a sergeant that there was a disturbance on deck, which he could not suppress; that the officer told him to go back and mind

§ 469. In an action against a carrier for a loss, his agent or servant is not generally a competent witness in his defence. The disqualification of the agent or servant consists in his having a direct interest in the event of the suit; or arising from his liability to his employer, in a subsequent action, to refund the amount of damages which the employer may have paid. This is the well-known rule as applicable to the relation of principal and agent, wherever that relation, in its broadest sense, may be found to exist.¹ As, for example, to the case of the captain of a vessel, in an action against the owner of a vessel for deviation or for negligence,² or to the case of a pilot, in an action against the owner and captain of a vessel for mismanagement while the pilot was in charge,³ or of a guard of a coach, implicated in the like mismanagement, in an action against the proprietor.⁴ Neither of such persons are competent, without a release, to give testimony, the direct legal effect of which will be to place themselves in a situation of security against a subsequent action.⁵ (a) But factors,

¹ It has frequently been *held*, that where negligence is imputed to the plaintiff's agent, such as if proved would preclude the plaintiff from recovering, such agent is an incompetent witness for the plaintiff. 1 Stark. Ev. 116. 1 Greenl. Ev. § 394. Thompson v. Lothrop, 21 Pick. 336. Dudley v. Bolles, 24 Wend. 465. But if a servant be in charge of the property of his master which has been destroyed or injured by the negligence of another, the servant is a competent witness. *Ibid*.

² *Rothero v. Elton*, Peake's Cas. 84. *De Symonds v. De la Cour*, 5 Bos. & P. 374. The captain of a canal-

boat is not a competent witness for the owner, without a release. *Humphreys v. Reed*, 6 Whart. 435.

³ *Hawkins v. Finlayson*, 3 Car. & P. 305.

⁴ *Whitmore v. Waterhouse*, 4 Car. & P. 383. In an action for negligently driving a mail-coach against the plaintiff's wagon, his wagoner was *held* to be incompetent, without a release; although he swore he left sufficient room for the defendant's mail, and although the jury found by their verdict that he was not to blame. *Moorish v. Foote*, 2 Moore, 508.

⁵ 1 Greenl. Ev. § 394. 1 Phillips, Ev. 61. 1 Stark. Ev. (3d Lond. ed.)

his orders; and that very soon after the report of a gun was heard, and the sergeant came back and said, "For God's sake, come up, a man has been shot." In *Packet Co. v. Clough*, 20 Wall. 528, a passenger was injured while coming aboard a passenger steamer. *Held*, that evidence of an admission by the master of the steamer two days after the accident, but during the voyage, that the deck hands were in fault in not putting out the regular plank, was not admissible as part of the *res gestæ*.

(a) If the plaintiff's claim or the defence rests on any misconduct of the agent towards his employer, for which the latter would be responsible to third

brokers, forwarding merchants, &c., are competent witnesses against the carrier, when offered to prove the receipt and delivery of the goods, and other acts within the scope of their employment. The exception to the general rule, that they may testify though interested, is founded in public convenience and necessity; for otherwise affairs of daily and ordinary occurrence could not be proved, and the freedom of trade and of commercial intercourse would be inconveniently restrained.¹

§ 469*a*. But it is not easy always to draw a precise line between the cases of servants called by their masters where the matter drawn in question is the carelessness or negligence of the servant, and the cases where servants and agents are called to acts done in the usual course of their employment, and where their masters may gain or lose by their testimony. In the former they are held to be incompetent; in the latter they are competent; for it is difficult to perceive what interest the witness has, when it

115-118. There is a distinction between those cases where the judgment will be evidence of the material facts involved in the issue, and those where it will be evidence only of the amount of damages recovered, which the defendant may be compelled to pay. 1 Greenl. Ev. § 393.

¹ 1 Greenl. Ev. § 476. In *Thorne v. Hallett*, in the Common Pleas (see "Boston Journal" of June 1, 1849), the plaintiffs were merchants in Vergennes, Vt.; and they brought their action against the captain of the schooner "Henry Curtis," to recover the value of a hogshead of sugar lost on the passage from Boston to Troy. The plaintiffs had purchased a large quantity of goods in Boston, including the lost hogshead; and they were properly directed to the care of M. D. Hall, at Troy; and were delivered on board the schooner then bound to

Troy. Hall was a forwarding merchant at Troy; and he as well as Flinn, the master of the canal-boat which took the rest of the plaintiff's goods from Troy to Vergennes, testified that the hogshead was not received with the other goods from the "Henry Curtis." The defendant's counsel objected to the competency of Hall and Flinn to testify, on the ground that they might be liable for the loss of the goods, and they were interested, as their testimony tended to exculpate themselves. But as it appeared that neither of the witnesses had any interest in the canal-boat, Hall being a forwarding merchant only, and so not liable as a common carrier (see *ante*, § 75), and Flinn being hired by the month, Chief Justice Wells ruled, that they were competent witnesses.

persons, and the agent to him, the agent cannot testify without a release. If the agent is not liable, no release is necessary. *Bailey v. Shaw*, 4 Foster, 297. A release by one of several part-owners of a vessel is sufficient to enable the master to testify. *The Peytona*, 2 Curtis, C. C. 21.

is considered it must be direct, and not contingent, possible, or uncertain.¹ (a)

§ 470. Upon the subject of burden of proof, in an action against a carrier for negligence, and as to the question upon whom it lies, the rule in respect to gratuitous carriers has already been laid down to be in conformity with the general rule of the law of evidence, viz., that where the allegation is affirmative it is sufficient to oppose it by a bare denial, till it is properly established; and that the proposition, though negative in its terms, must also be proved by the party who states it;² as where there is a charge against a carrier without hire, of gross negligence, which is in the nature of fraud.³ But although, in actions on the case and of assumpsit, the burden of proof is on the plaintiff to make out his case as he charges it, proof of demand and refusal, or an apparent conversion, in an action of trover, will put the defendant on his defence.⁴ Wherever non-feasance or negligence is alleged, in an action on contract, the burden of proof is unquestionably on the plaintiff, notwithstanding its negative character;⁵ that is, the party making the allegation of loss or non-delivery must give some evidence in support of the allegation, notwithstanding its negative character.⁶ (b) In respect to the carriage of goods for hire by persons who are not common carriers, it has appeared, that there are discrepancies in the authorities as to the application of the above rule,⁷ In cases which have been cited, it was con-

¹ Per Shaw, C. J., in *Draper v. defendant. Lane v. Crombie*, 12 Pick. Norwich R. 11 Met. 505. *Bent v. 177.*
Baker, 13 T. R. 27. *Green v. New*
River Co. 4 T. R. 590.

² See *ante*, Chap. IV. 1 Greenl. Ev. ch. iii. Where the plaintiff alleges damage in consequence of the defendant's negligence in driving on the highway, the burden of proof is on the plaintiff to show ordinary care on his own part, and want of it on the part of the de-

³ See *ante*, §§ 37, 38, for the authorities on this subject, and 1 Greenl. Ev. § 80.

⁴ *Ante*, § 38, n.

⁵ 1 Greenl. Ev. § 81. See *ante*, § 48, n.; also §§ 32, 33, 35.

⁶ 2 Greenl. Ev. § 213. *Tucker v. Cracklin*, 2 Stark. Ev. 385.

⁷ See *ante*, § 61, and the authorities there cited.

(a) See *Johnson v. Lightsey*, 34 Ala. 169.

(b) *Woodbury v. Frink*, 14 Ill. 279. And to charge a carrier with the loss of articles packed in a trunk, it must satisfactorily appear that the articles were not stolen after the trunk was packed and before delivery to the carrier. *McQuesten v. Sanford*, 40 Maine, 117.

sidered, that the fact of a loss by a carrier for hire, by secret purloining of the goods in his hands, is such *prima facie* evidence of the want of ordinary care as to compel the defendant to rebut it by proof of ordinary care; and such is the opinion advanced by Sir William Jones.¹ Where a public conveyance is overturned or breaks down, without any apparent cause, the law will imply negligence, and the burden of proof is on the owners to rebut that legal presumption.² And the very occurrence of loss or damage to goods delivered to a private bailee for hire seems to be regarded, of itself, cogent evidence of the want of ordinary care.³ The reason it is so, and that it is sufficient, if the plaintiff offers such evidence, as, in the absence of any counter testimony, affords ground of presuming that the allegation he makes is true, is, that if proof of the negative were required, the inconvenience would be very great.⁴ However, in most cases, the question of negligence is more a question of fact to be determined by the jury, under the particular circumstances, than of law.⁵

§ 471. In an action against carriers for the loss of a parcel, the consignee's shopman, not knowing of the delivery, and believing he must have known it if a delivery had taken place, is *prima facie* evidence of non-delivery. In an action of assumpsit for negligence in carriers in losing a parcel, in which the general issue was pleaded, it appeared that the plaintiff had ordered goods to be sent by the defendants' stage-coach, and the consignor of the goods proved the giving the parcel to the defendants' coachman, and that it was directed to the plaintiff. To show that it never came to hand, the plaintiff's shopman was called, who did not know of the delivery, but believed it could not have been delivered without his knowledge. Hullock, B., considered, that the evidence of non-delivery was sufficient to call on the defendants to prove a delivery by their porter, or some other witness; because the plaintiff could not be expected to prove a non-delivery better than he had done.⁶ (a)

¹ *Ante*, § 48 *et seq.*

² *Ware v. Gay*, 11 Pick. 106.

³ See *ante*, § 50.

⁴ 1 Greenl. Ev. §§ 78, 79.

⁵ *Ante*, § 51, and the authorities there referred to, and § 184 *et seq.*

⁶ *Griffiths v. Lee*, 1 Car. & P. 110.

(a) In *Morley v. Eastern Exp. Co.* 116 Mass. 97, an action was brought against a common carrier for the loss of a box. The plaintiff testified that

§ 472. In respect to a loss by a common carrier, the burden of proof is, without any manner of doubt, upon him to show, that the loss was occasioned by the act of God or the public enemy,¹ though the burden of proof in an action on the case may be on the plaintiff to show, that the property did not safely reach its destination; and yet, in *assumpsit*, it may be sufficient to prove the delivery of the property to the defendant, and then call upon him to account for it.² If a cargo weighing a certain weight be delivered to him to be carried, and when the cargo arrives at its destination the weight be deficient, this is evidence from which a jury may infer negligence in the carrier; and if the deficiency did not arise from the negligence of the carrier, it is incumbent on him to show that. It was proved in *Hawkes v. Smith*,³ that more than sixty-nine tons of bones were put on board the defendant's vessel, and that, at the end of the voyage, there were not sixty-nine tons, but a much smaller weight. The defendant pleaded that he took proper care of them, and did carry them safely in a reasonable time; and also that the bones were put on board in a damp state, by reason whereof, and without any default of the defendant, they became decomposed, and the defendant, therefore, could not perform his promise. By Rolfe, B.: "I think

¹ See *ante*, § 202, and Chap. VI. generally. An authority not there cited is the case of *King v. Shepherd*, 3 Story, 349. In that case a box of gold sovereigns was shipped, to be carried from New York to Mobile, and the bill of lading only contained the usual exceptions against "perils of the seas," and the ship was wrecked and the money lost. It was *held*, that the burden of proof was on the master and owners of the ship to show that

the loss occurred by a "peril of the seas;" and that, failing to do this, they were responsible for the loss, however it occurred. And see *ante*, § 188 *et seq.*

² *Tucker v. Cracklin*, 2 Stark. 385. *Day v. Ridley*, 16 Vt. 48. That the burden of proof may be turned upon the defendant by slight proof, see *Griffiths v. Lee*, *ub. sup.*

³ *Hawkes v. Smith*, 1 Car. & M. 72.

she owned the box and its contents; that it was delivered to the carrier at Lewiston, marked Edward Gough, Dexter; that she had made efforts to find the box, but had not been able to do so; that she had made inquiries about it at the offices of the defendant in Lewiston and Dexter; that she had not received it or heard of it since; and that she had inquired of Gough about the box. The defendant offered no evidence. The court *held* that there was no evidence to go to the jury, that the box had not been delivered to Gough, and that the burden in this respect was on the plaintiff. *Smith v. National Bank*, 99 Mass. 605, is cited. This was, however, a case of a gratuitous bailment.

that this is evidence from which the jury may infer negligence; and that if there was no negligence on the part of the defendant, he should show that.”¹ (a)

§ 473. But where a common carrier has qualified his liability as such, by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents and rates of freight; and it is proved that such notice is brought home to the knowledge of the employer, he (the carrier) then descends to the situation of a private carrier for hire, and therefore the burden of proof of negligence falls more upon the employer. But the burden of proof is on the common carrier to show clearly that the person with whom he deals has been fully informed of the terms of the notice.²

§ 474. The law of evidence, in respect to the value of the goods lost by a bailee, is of much importance. Where no fraud has been proved on the part of a bailee, the presumption as to the precise value will be against the demand of the plaintiff, unless he establishes the precise value by clear evidence. But if the conduct of the bailee be tainted with fraud, the presumption will be in favor of the plaintiff's demand. In *assumpsit* for goods sold by a liquor merchant, and the only proof as to the contents of the bottles delivered being by the plaintiff's servants, who could not speak to the quality of the contents, the jury, in the absence of all fraud, were directed to presume them filled with the cheapest liquor with which the plaintiff dealt.³ So where the delivery of a bank-note was proved, but its denomination not shown, the jury were instructed to presume it to be of the lowest denomination in circulation.⁴ In the case of *Armory v. Delamirie*,⁵ on the other

¹ As to loss of goods by decay, leakage, &c., see *ante*, §§ 210-214.

⁴ *Lawton v. Sweeney*, Exch. 1844, 8 Jur. 964, cited in 2 Greenl. Ev. § 255.

² See *ante*, §§ 54, 245, 247 *et seq.*, 267, 268.

⁵ *Armory v. Delamirie*, 1 Stra. 505.

³ *Clunnes v. Pezzay*, 1 Camp. 8.

(a) *Alden v. Pearson*, 3 Gray, 342. *Clark v. Barnwell*, 12 How. 280. The Schooner *Emma Johnson*, 1 Sprague, 527. The Ship *Martha*, Olcott, Adm. 140. *Zerega v. Poppe*, Abbott, Adm. 397. *Shaw v. Gardner*, 12 Gray, 488. Ship *Howard v. Wissman*, 18 How. 231. *Hall v. Cheney*, 36 N. H. 26. *Lewis v. Smith*, 107 Mass. 334. See *ante*, § 202.

hand, the presumption of the value of the thing in question was, on account of fraud in the defendant, in favor of the plaintiff. That case was,—a chimney-sweeper's boy having found a jewel took it to the defendant, a goldsmith, to know its value. The defendant knocked out the stones, and returned the plaintiff the setting, refusing to give him back the stones. In trover for the value of the stones, Pratt, C. J., directed the jury, that unless the defendant would produce the stones, so as to show they were not of the finest water, they ought to presume against him, and make the value of the best jewels that would fit that setting the measure of their damages. (a)

§ 475. Supposing the delivery of a box or trunk to a carrier for conveyance, and the loss of it by him to be fully proved, (b) and that no person but the owner has knowledge of the particular contents, the question by what evidence, in an action for damages against the carrier, or in an action of trover for the goods, is the quality, quantity, and value of the goods to be ascertained and estimated by the jury, is one of great practical importance to the community. (c) In *Butler v. Basing*,¹ the action was against the defendant as proprietor of a stage-wagon for the loss of a box, and Garrow, B., in summing up to the jury, said: "With regard to the amount of the damages in case a verdict passes for the plaintiff, it is right that I should tell you that here is no distinct evidence of the contents of the box; however, I should recommend you not to pare down the amount of damages, because the articles contained in it cannot be distinctly proved. It very often happens that persons, more especially those in the station of life in which the plaintiff is, pack their own clothes, and in

¹ *Butler v. Basing*, 2 Car. & P. 613.

(a) A person who has acquired the possession of goods, and who has put it out of the power of the owner to show the quality and value of the property by any artifice or concealment, may be held liable for the value of the best quality of such goods. *Bailey v. Shaw*, 4 Foster, 297.

(b) The delivery of a baggage check by a railroad company to a passenger is *primâ facie* evidence that the company has the baggage. *Davis v. Michigan R.* 22 Ill. 278. *Dill v. South Carolina R.* 7 Rich. 158. See *Illinois Central R. v. Copeland*, 24 Ill. 332.

(c) If a suit is brought by a special bailee of property lost, the owner may by releasing his interest in the property qualify himself as a witness. *Moran v. Portland S. P. Co.*, 35 Me. 55.

such cases it must be always impossible to give evidence of the precise contents of the boxes or portmanteaus. I should therefore recommend you, if you find for the plaintiff, to give damages proportioned to the value of the articles which in your judgment you think the box might and did fairly contain.” (a)

§ 476. Mr. Bell says: “The value of the parcel or thing lost may occasion difficulty, unless dispensed with by a general rule. A person cannot always have direct and positive evidence of the sum which may have been in his pocket-book when stolen from an inn; or of the value of his luggage taken from a coach. In order to get quit of the difficulty, a very clumsy and dangerous remedy formerly prevailed in Scotland, namely, that the person should, by his own oath, be allowed to establish that value against the carrier or innkeeper; it being reserved to the court to restrain the claim.” He further observes: “I should have no doubt that reasonable evidence would now be required of the nature and value of the thing lost, fortified by the oath of the employer.”¹ It is indeed very well known, that, as a general rule, a party is not competent to testify in his own cause; but this general rule, like every other, has its exceptions; and necessity, either physical or moral, it has been said, dispenses with the ordinary rules of evidence.² This principle of necessity is recognized in England in decisions which have been made on the statute of Winton, in which it is held that the party robbed is, from necessity, a competent witness to prove the robbery, and of what sum or things he was robbed, in support of his own action.³ It is also laid down, that on a trial at Bodnyr, *coram* Montagu, against a common carrier, a question arose about the things in a box, and he declared that this was one of those cases where the party himself might be a witness *ex necessitate rei*; for every one did not show what was put in his box.⁴

§ 476 a. The principle that necessity dispenses with the ordinary rules of evidence has been recognized in Pennsylvania, in an action to recover the value of the contents of a trunk lost from a

¹ 1 Bell, Com. 379, 380.

being admitted *ex necessitate*, in the Admiralty, see *post*, § 670.

² Per Rogers, J., in *Clark v. Spence*, 10 Watts, 335. And see 1 Greenl. Ev. § 348. As to the testimony of witnesses who are interested

³ Rolle, Abr. 685, 686, cited in *Herman v Drinkwater*, 1 Greenl. 27.

⁴ 12 Vin. 24, pl. 32.

(a) This case was followed in *Dill v. South Carolina* R. 7 Rich. 158.

stage-coach, and the plaintiff was held to be a competent witness to prove the contents and the value of the articles composing them; and, in giving the judgment of the court in this case, Gibson, C. J., said: "On the ground of necessity, the plaintiff was competent, not only to specify the articles contained in the trunk, but to prove the value of them. Book entries by the parties' own hand are evidence, not only of sale and delivery, but also of price, which is a part of the contract. Originally such entries were allowed to prove, perhaps, no more than delivery; but experience induced the courts to go further. Yet the value of merchandise, bearing as it does a determinate price in the market, might be more readily estimated from description than the more uncertain value of clothing, in every degree of wear, which the owner would be better able to estimate than a disinterested witness, who must, after all, found his judgment on the description which the owner may choose to give. Why trust to his data and not to his estimate? It is as easy to give a false description as to overrate the value." ¹

§ 477. In *Herman v. Drinkwater*, a shipmaster having received a trunk of goods on board his vessel to be carried to another port, which on the passage he broke open and rifled of its contents; the owner of the contents proving the delivery of the trunk and its violation was admitted a witness in an action of trover for the goods against the shipmaster, to testify to the particular contents of the trunk, there being no other evidence of the fact to be obtained. The case was, however, an aggravated case, and exhibited conduct of great moral turpitude on the part of the defendant. The plaintiff was an unsuspecting foreigner, ignorant of the language of the United States, to which country the defendant belonged. Having invested his property in certain articles of small bulk, he shipped them, packed in a trunk, on board the brig of which the defendant was master, then in the port of London, who undertook to transport them to New York. He also engaged a passage for himself in the same vessel to accompany his goods, and sent on board his clothes and other baggage necessary for his personal accommodation; but the defendant, indifferent as to the interest of the stranger, sailed without him;

¹ *Whitesell v. Crane*, 8 Watts & S. 369. See a like decision in *Mad River R. v. Fulton*, 20 Ohio, 318, — contents of a trunk. As to amount of money in a trunk for travelling purposes, see *Johnson v. Stone*, 11 Humph. 419.

and, on the passage, he violated the trunk, presented a part of the contents to his mate and crew, but kept the more valuable himself; professedly, because he might be held responsible at a future day. Instead of sailing for New York, he sailed for, and arrived at, Portland; and at the latter place disposed of a part of his plunder. In the mean time the plaintiff took passage in another vessel, and arrived at New York, where, not hearing of the defendant, he wrote to Portland where the vessel was owned. His correspondent applied to the defendant, who denied ever having received the goods; and it was not until certain of the articles sold in Portland were identified beyond all question, by the particular description which the plaintiff had furnished, under oath, of the contents of the trunk, that the fact was established that the defendant had received and embezzled the property. To prove the particular contents, the judge, who presided at the trial, admitted the deposition or affidavit of the plaintiff, upon the ground of necessity; he not having it in his power to establish the fact by other proof. The testimony was objected to on the part of the defendant, and a new trial granted. Weston, J., in giving the opinion of the court, said: "In the case before us, the plaintiff had sustained his action by proof not liable to objection; but the extent of the damages to which he was entitled could be ascertained only by his own testimony. As he was to accompany the goods himself, it is not to be presumed that he took any bill of lading or receipt from the defendant; and if he had, such an instrument does not usually specify the particular contents of trunks and packages. The plaintiff, therefore, unless his oath is admitted, must be deprived of an adequate remedy, although the justice of his claim is most apparent. The analogy between his case and that of the party robbed, in an action under the statute of Winton, is very striking; and his testimony is strongly corroborated by circumstances. Upon the whole, we are all of opinion, that the deposition or affidavit of the plaintiff was rightly admitted, upon the ground of necessity."¹

¹ *Herman v. Drinkwater*, 1 Greenl. 27. The defendant in this case was clearly guilty of a felony. A servant is guilty of felony in stealing his master's goods, although he has the custody of them for a particular purpose.

East, P. C. 554, and 2 Stark. Ev. (3d Lond. ed.) § 10. So where a butler steals his master's plate. *East*, P. C. and 2 Stark. *supra*. So if the servant has the goods for a specific purpose, as where money had been

§ 478. In the case given in the preceding section the defendant had committed a gross fraud, and the party's own oath was allowed as evidence, *in odium spoliatoris*.¹ (a) But it has been held that a bailor, though a plaintiff, may be a competent witness to prove the particular contents of a trunk, lost not by the car-

delivered to a servant to be delivered to a third person, and he spent a part, and embezzled the rest. *Rex v. Lavenden*, East, P. C. 566. So where a carter went away with his master's cart, it was held that he was guilty of felony. *Robinson's case*, East, P. C. 565. Where a porter was sent by his master with goods to be delivered to a customer, and he broke open the parcel and sold them, it was held to be a felony. *Rex v. Bass*, Leech, 285, and 2 Stark. *sup.*; and this is precisely the case of *Herman v. Drinkwater*, cited above. But in all cases where the party has a legal possession of the property distinct from that of the owner, he is not guilty of felony in appropriating the goods, unless the possession be obtained with a felonious intent to steal the goods, for then the party acquires no legal possession against the owner, for the law will not permit him to take advantage of his own wrong; and in point of law no contract exists. 2 Stark. Ev. *sup.* The circumstances may be such, that the fact of selling the goods is *primâ facie* evidence of an original felonious intent. If a carrier unpacks the goods, the very act itself determines the trust possession, and the subsequent taking is felonious, for the thing committed to his trust is single and entire. 21 H. 8, pl. 14; 1 Hawk. c. 33, § 5.

¹ Mr. Greenleaf says: "To the general rule, in regard to parties, there are some exceptions, in which the party's own oath may be received as competent testimony. One class of these exceptions, namely, that in

which the oath *in litem* is received, has long been familiar in courts administering remedial justice according to the course of the Roman law, though in the common-law tribunals its use has been less frequent and more restricted. The oath *in litem* is admitted in two classes of cases: first, where it has been already proved that the party against whom it is offered has been guilty of some fraud, or other tortious and unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of damages; and secondly, where, on general grounds of public policy, it is deemed essential to the purposes of justice. An example of the former class is given in the case of the bailiffs, who, in the service of an execution, having discovered a sum of money secretly hidden in a wall, took it away and embezzled it, and did great spoil to the debtor's goods; for which they were holden not only to refund the money, but to make good such other damage as the plaintiff would swear he had sustained. *Childrens v. Saxby*, 1 Vern. 207; 1 Eq. Ca. Ab. 299. So where a man ran away with a casket of jewels, he was ordered to answer in equity, and the injured party's oath was allowed as evidence *in odium spoliatoris*. *Anonymous*, cited in *East India Co. v. Evans*, 1 Vern. 308." 1 Greenl. Ev. § 348. Mr. Greenleaf then adds, that the rule is the same at law, and he cites *Herman v. Drinkwater*, *ub. sup.*, and refers to *Sneider v. Geiss*, 1 Yeates, 34.

(a) See also *Garvey v. Camden R. 1 Hilton*, 280.

rier's fraud, but through his negligence ; that is, if a foundation be first laid for the party's oath down to the period to which the party is to speak ; as by proving the delivery of the trunk to the carrier, and the loss of it by his negligence.¹ Yet it is proper that the admission of such testimony should be limited to clothing and personal ornaments. In *Pudor v. Boston and Maine Railroad Co.*² the plaintiff had laid the foundation of his action by proving that he had delivered to the company a box to be carried to a certain place ; that the box was not delivered by the carrier ; that he had made a demand thereof ; and that the defendant admitted its loss. He then offered to show by his own testimony (it not appearing that he had any other means of showing it) what was in the box, and the value of the articles ; but as the declaration alleged that the box contained medical books, medicines, surgical instruments, and chemical apparatus, it was held that the party's oath was inadmissible ; and judgment was rendered for him only for the value of the box.

§ 478 *a*. In the case of *Clark v. Spence*, in Pennsylvania, it was agreed that the party may by his own oath prove the clothes, and even the personal ornaments contained in the trunk containing the clothing of a passenger.³ But where these clothes are set at a very high value, or the ornaments are very numerous and estimated at high prices, it may be necessary to require some proof that the party alleging the loss actually possessed such articles of such price when at home, and neither sold them nor left them at home, or the place of his or her last residence.⁴ If the plaintiff must in every other instance prove his case by legal evidence, courts should be careful not to extend the exception beyond its legitimate limits. It is admitted from necessity, and perhaps on a principle of convenience, because every one does not show what he puts in a box ; and it applies with great force to wearing apparel, and to every article which is necessary or convenient to the traveller, which in most cases are packed by the party himself, or his wife, and which, therefore, would admit of no other proof. A lady's jewelry would come within this class, and it is easier to conceive than to enumerate other articles which come within the same

¹ *Clark v. Spence*, 10 Watts, 335.

Bingham v. Rogers, 6 Watts & S. 495.

McGill v. Rowand, 3 Barr, 342, 451.

1 Greenl. Ev. §§ 348, 349.

² *Pudor v. Boston R.* 26 Me. 458.

³ *Clark v. Spence*, *ub. sup.*

⁴ *Bingham v. Rogers*, *ub. sup.*

category. But it must not be understood that such proof can be admitted merely because no other evidence of the fact can be obtained; for, if a merchant, sending goods to his correspondent, chooses to pack them himself, his omission to furnish himself with the ordinary proof is no reason for dispensing with the rule of evidence which requires disinterested testimony. Such omission is not of the usual course of business, and there must be something peculiar and extraordinary in the circumstances of the case which would justify the court in admitting the oath of the party.¹

§ 479. The principle of necessity which, in Pennsylvania, enables a party, under particular circumstances, to be a witness to prove the contents of a lost trunk or box, applies with as much if not greater force to the wife as well as to the husband. Either may be admitted to prove the quantity and value of the wearing apparel belonging to each (including in the catalogue the wife's jewelry, and every other article pertaining to her wardrobe), that may be necessary or convenient to either in travelling. The wife usually packs her husband's trunk, and always her own, and therefore to say she cannot in a proper case be a witness, would amount almost to a repeal of the rule, and in most cases to a denial of justice.² (a)

§ 480. In actions under the statute of Winton before mentioned, the loss was by robbery, and the action in the before-mentioned case of *Herman v. Drinkwater*, there was a tortious or fraudulent taking away; but where there is a loss not happening by robbery or fraud, and the case is simply a case of negligence in the carrier, it has been held (contrary to the decisions above referred to in Pennsylvania, by the Supreme Court of Massachusetts), that such a case is not brought within any exception to the general common-law rule of evidence; and that court have been of opinion that to admit the plaintiff's oath in cases of the last-mentioned nature would lead to much greater mischiefs in the

¹ *Clark v. Spence, ub. sup.*

² Per Rogers, J., in delivering the opinion of the court in *McGill v. Rowand*, 3 Barr, 451. The evidence of the plaintiff's wife in this case was admitted, as to the list of the articles in her own and her husband's trunk;

and also the evidence of the husband as to the list of articles in his own trunk, with the values annexed. In the catalogue testified to and valued by the wife, were a valuable diamond breast-pin, a gold breast-pin, and a miniature set in gold, with chain.

temptation to frauds and perjuries than can arise from excluding it. In an action against a railroad company to recover damages for the loss of a trunk, the court accordingly decided that the plaintiff was not a competent witness to prove the contents of the trunk, although he had no other evidence. In giving the opinion of the court, Hubbard, J., remarked as follows: "If the party about to travel places valuable articles in his trunk, he should put them under the special charge of the carrier, with a statement of what they are, and of their value, or provide other evidence beforehand of the articles taken by him. If he omits to do this he then takes the chance of loss, as to the value of the articles, and is guilty, in a degree, of negligence,—the very thing with which he attempts to charge the carrier. Occasional evils only have occurred from such losses through failure of proof; the relation of carriers to the party being such that the losses are usually adjusted by compromise. And there is nothing to lead us to innovate on the existing rules of evidence. No new case is presented; no facts which have not repeatedly occurred; no new combination of circumstances." ¹ (a)

§ 481. The difficulty in respect to restricting the quantity or value of the articles that may be deemed proper or useful, as a traveller's baggage, for his or her ordinary purposes, is admitted in Pennsylvania. The subject, it is there considered, is susceptible of no precise or definite rule; but it is held that when there is an attempt to abuse the privilege in question, it is to be left to the intelligence and integrity of the jury to apply the proper cor-

¹ *Snow v. Eastern R.* 12 Met. 44. ing apparel, books, and twenty-five
The trunk in question contained wear- dollars in money.

(a) See also *Dill v. South Carolina R.* 7 Rich. 158; *Doyle v. Kiser*, 6 Ind. 242. Such evidence is now allowed by statute in Massachusetts, and it has been held to apply to the case of the loss of a trunk left by the passenger with the baggage-master of a railroad corporation, after arriving at his place of destination. *Harlow v. Fitchburg R.* 6 Gray, 237. In *Wright v. Caldwell*, 3 Mich. 51, it is held that the owner of a trunk, in an action for the breach of a contract of affreightment, cannot testify to the contents of the trunk. See also *Adams Exp. Co. v. Haynes*, 42 Ill. 89. In Illinois, evidence of the owner of baggage is admissible if there is no other person who can prove the contents. *Parmelee v. McNulty*, 19 Ill. 556. See *Davis v. Michigan R.* 22 Ill. 278. The passenger may prove the loss of the trunk and what the contents were, but not the value of them. *Illinois Central R. v. Copeland*, 24 Ill. 332.

rective.¹ The naked question in *David v. Moore*,² was whether the plaintiff was a competent witness to prove that he had money (the sum of \$75) in his trunk, which was cut from the stage-coach of the defendants, in which the plaintiff was a passenger; and it was held that he was not.³

11. Damages.

§ 482. The amount of damages to be recovered where goods are intrusted to a carrier, and they are not delivered according to his undertaking, depends upon his liability being established, either to answer for the whole value, or only to the extent to which he has succeeded in limiting his responsibility by notice. The general rule in the former case is, that the value of the goods is the measure of damages.⁴ (a) But, as Mr. Sedgwick says, the question at once arises, whether that value is to be computed at the place where delivered to the carrier, or at the place of destination. It seems, says that author, to be well settled that the measure of damages is the value of the goods at the latter place; and that this sometimes involves an inquiry into foreign markets, and will generally include the profits of the adventure; and that it has been rightly held that nothing less will satisfy the contract.⁵ (b)

¹ *McGill v. Rowand*, 3 Barr, 451.

⁴ *Sedgwick on Damages*, 370. *Lud-*

² *David v. Moore*, 2 Watts & S. 230.

wig v. Meyre, 5 Watts & S. 435. *Hand v. Baynes*, 4 Whart. 204.

³ See *ante*, §§ 115, 116.

⁵ *Sedgwick, ub. sup.*

(a) There can be no abandonment of the goods for a partial loss. *Shaw v. South Carolina R.* 5 Rich. 462. *Michigan R. v. Bivens*, 13 Ind. 263. *Henderson v. Ship Maid of Orleans*, 12 La. Ann. 352.

(b) The measure of damages is the value of the goods at the place of delivery at the time they should have been delivered. *Spring v. Haskell*, 4 Allen, 112. *Cutting v. Grand Trunk R.* 13 Allen, 381. *Bailey v. Shaw*, 4 Foster, 297. *Ringgold v. Haven*, 1 Calif. 108. *Hart v. Spalding*, 1 Calif. 213. *Hackett v. Boston R.* 35 N. H. 390. *Galena R. v. Rae*, 18 Ill. 488. *Dean v. Vaccaro*, 2 Head, 488. *Peet v. Chicago R.* 20 Wis. 594. *Cowley v. Davidson*, 13 Minn. 92. *Rice v. Baxendale*, 7 H. & N. 96. *Great Western R. v. Redmayne*, L. R. 1 C. P. 329. In *Ingledeu v. Northern R.* 7 Gray, 86, ink was frozen after delivery by the defendant to another carrier to be forwarded to the plaintiff. It was claimed that there was delay in the carriage, and that if the ink had arrived sooner it would not have been injured. *Held*, that the rule was the diminution in value of the ink at the time of its arrival, as compared with what it would have been worth if it had come without delay; that if it could have been sold for its fair value at the place where the liability of

The principle, as to the obligation of the carrier to respond conformably to the measure of damages thus stated, is happily illustrated by Chief Justice Tilghman, in giving the opinion of the court in *Gillingham v. Dempsey*:¹ “If we consider it,” says he, “on principle, the damage of the plaintiff is the loss which he has suffered by the non-delivery of his goods at the place of destination, and that loss is the nett price which the goods would have brought at that place. In insurance, the law is so well known that the merchant who wishes to cover himself to the amount of his goods at the port of destination may do so by valuing them in the policy accordingly, or by a special insurance on profits. But this is never done in contracts for carriage,—an argument of some weight, that it has been supposed the plaintiff may recover according to the value at the port of destination. Then, if we consider the policy which should regulate these contracts, it is best to remove from the carrier all temptation to fraud, which will be best done by making himself answerable for the value at the port

¹ *Gillingham v. Dempsey*, 12 S. & R. 188.

the defendants ceased, the injury sustained by the plaintiff would be slight; that if there was no market for it there, and the best thing that could be done, under all the facts of the case, was to forward it, the question would be, how much less was it worth for that purpose than it would have been had it arrived in due season at the place of delivery? It was also *held*, that the consignee could not recover of the carrier for his loss of time in waiting for the goods which the carrier had unreasonably delayed to deliver. See *Collard v. South Eastern R.* 7 H. & N. 79; *Simmons v. South Eastern R.* 7 H. & N. (Am. ed.) 1002. Where goods are to be delivered in a foreign country, and a breach of the contract occurs, the measure of damages is doubtless the value in that country; and if gold is the basis of value there, and suit is brought in this country, where payment may be made in legal tenders, the question is important as to the way in which the damages are to be assessed. As bearing on this question, see *The Vaughan*, 14 Wall. 258. Goods were shipped in Canada on a canal-boat for New York. While the boat was on the Hudson River in New York, in tow of a steamboat, it was sunk by a collision with another steamboat, and the cargo was lost. The owners libelled both steamboats, and it was *held* that the collision was caused by the fault of both boats. The District Court *held* that the measure of damages was the value of the cargo in Canada currency, which was equivalent to gold on the day of shipment. The Circuit Court changed the decree, giving the value of Canada currency in legal tender notes at the time of shipment; and this decree was affirmed by the Supreme Court, though on the day of the decree legal tender notes were worth nearly twice as much as they were on the day of the shipment.

of delivery. If the goods should be of increased value at the place of delivery, as they generally are, and the liability extends no further than the value at the place of shipment, there is very great temptation to fraud; and it will be extremely difficult for the plaintiff to prove whether the loss happened by fraud, negligence, or unavoidable accident." The learned judge said, in addition: "It would require very strong authority to satisfy me that where the carrier fraudulently disposed of the goods at the place of delivery, and made great profit thereby, he, or his principal, should be responsible for no more than the value at the place where he had received them. It may be said that in such case the carrier himself, if the fraud could be proved, would be liable in an action of trover, for damages, to the full amount of what he made by his fraud. But that involves the plaintiff in the difficulty of proving the fraud, and besides, the carrier himself is often worth nothing, and his principal, the only person looked to, would not be answerable in trover." Such seems clearly to be the doctrine in England.¹

§ 482*a*. The rule laid down by Baron Alderson, as the proper rule, is, that where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it.² (*a*)

¹ In an action of assumpsit against the defendants as owners of "The Helena," for not delivering a cargo of wheat shipped to the plaintiffs, the cargo reached the port of discharge, but was not delivered, and the price of the cargo at the time it reached the port of destination was held to be the rule of damages. *Brandt v. Bowlby*, 2 B. & Ad. 932. On a contract to deliver hogs at a particular

place, within a certain time, in case of failure to perform, the measure of damages is the difference in their value at such place, at the time of actual delivery, and their market value at the time of delivery fixed by the contract. *Sangamon R. v. Henry*, 14 Ill. 156.

² *Hadley v. Baxendale*, 9 Exch. 341.

(*a*) *Smeed v. Foord*, 1 Ellis & E. 602. *Gee v. Lancashire R.* 6 H. & N. 211. *Collard v. South Eastern R.* 7 H. & N. 79. *Wilson v. Newport Dock Co.* L. R. 1 Ex. 177. *Great Western R. v. Redmayne*, L. R. 1 C. P. 329.

§ 483. The above case of *Gillingham v. Dempsey* was an action on a bill of lading against T. D., by which he engaged to carry certain crates of earthen-ware belonging to the plaintiff from the port of Liverpool to the port of Philadelphia, and it appeared that, in consequence of not stowing them properly, some of the crates were crushed by the weight of those above. The jury

Woodger v. Great Western R. L. R. 2 C. P. 318. *Cutting v. Grand Trunk R.* 13 Allen, 381. *Cory v. Thames Ironworks Co. L. R.* 3 Q. B. 181. In *British Columbia Sawmill Co. v. Nettleship, L. R.* 3 C. P. 499, machinery was delivered at Glasgow in different cases for shipment on a vessel owned by the defendant. One case was not delivered, and the ship-owner was held responsible. On the question of damages it appeared that the master of the vessel knew that the cases contained machinery intended for a mill to be erected and used in British Columbia, for the purpose of the business of the plaintiff, in cutting and sawing lumber. He also knew that the missing box contained part of the machinery, but had no knowledge otherwise as to the contents of the box. The actual cost to the plaintiff of replacing the missing machinery, which was obtained from England, and the freight out, amounted to £353 17s. 9d. The time occupied in replacing it was between eleven and twelve months, during which time the mill stood idle. The plaintiff claimed, in addition to the cost, a fair rate of hire or use and occupation value of the missing portion for the time the mill stood idle, or a fair rate of hire or use and occupation value of the whole machinery for this time. The defendant contended that to make him liable for the consequences resulting to the plaintiff, the plaintiff must show that the defendant had notice that the case in question contained an important part of the machinery, in the absence of which no part of it could be used, and that the master was aware that the case contained articles which could only be obtained in England. *Bovill, C. J.*, said: "The extent of the carrier's liability is to be governed by the contract he has entered into, and the obligations which the law imposes upon him. He is not to be made liable for damages beyond what may fairly be presumed to have been contemplated by the parties at the time of entering into the contract. It must have been something which could have been foreseen and reasonably expected, and to which he has assented expressly or impliedly by entering into the contract." *Willes, J.*, said that the mere fact of knowledge could not increase the liability. "The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. . . . Knowledge on the part of the carrier is only important if it forms part of the contract." It was held that the plaintiff could recover the cost of replacing the machinery, and interest as damages for the delay. See also *Horne v. Midland R. L. R.* 7 C. P. 583; affirmed in *Exch. Ch. L. R.* 8 C. P. 131; *Cork Distilleries Co. v. Great Southern R. L. R.* 7 H. L. 269; *Simpson v. London R.* 1 Q. B. D. 274.

found a verdict for the plaintiff, subject to the opinion of the court, on a point reserved, namely, whether the loss of the plaintiff was to be estimated at the first cost of the article at the port of embarkation, or at the market-price at the time of delivery at the port of destination. It was held (Chief Justice Tilghman delivering the opinion of the court), that the measure of damages was the net value of the goods at the port of destination.¹ In a more recent case in Pennsylvania, it was held that the measure of damages is the value of the article lost, at the place to which it is consigned, and interest.² In *O'Connor v. Forster*, in the same State,³ in an action for a breach of contract to carry wheat from Pittsburg to Philadelphia, the difference between the value of the wheat at Pittsburg, with the freight added, and the market-price at Philadelphia, at the time it would have arrived there, if carried according to contract, was held to be the measure of damages. There was no reason, the court asserted, why carriers who engage with merchants to transport merchandise, should not be held to a strict performance of their engagements, and that this is to be done by obliging them to indemnify the shippers fully. (a)

§ 484. In New York, where a suit was brought on an agreement to carry a quantity of salt from Oswego to Queenston, the difference in value of the articles at Oswego and at Queenston at the time was held the true rule of damages.⁴ The same rule was laid down in New York, in an action against the master of a vessel where the goods had been embezzled on the voyage, without fraud on the part of the defendant; and, in this case, the court held the following language in respect to interest: "The question of interest depends upon circumstances. The jury may give interest by way of damages in cases in which the conduct of the master was improper. But here no bad conduct is to be imputed to him; and interest is not, in every case, and of course,

¹ *Gillingham v. Dempsey*, *ub. sup.*

⁴ *Bracket v. M'Nair*, 14 Johns.

² *Warden v. Greer*, 6 Watts, 424. 170.

³ *O'Connor v. Forster*, 10 Watts,

(a) If the carrier is held liable for the value of the goods at the port of destination, freight is allowed him. *Atkisson v. Steamboat Castle Garden*, 28 Misso. 124.

recoverable, because the amount of the loss is unliquidated and sounds in damages to be assessed by the jury."¹(a)

§ 485. Where the defendant contracted to carry fifty tons of the plaintiff's hay to a distant port for sale, the hay to be delivered at the ship's side, and after receiving twenty-four tons on board declined taking any more, because the ship was full, it was held that it was not necessary for the plaintiff, after this refusal, to tender the residue of the hay at the ship's side, in order to entitle himself to damages; and that the rule of damages was the difference between what the plaintiff in fact received, or with due diligence and prudence might have obtained for the hay left in his hands, and the price at the port of destination, deducting freight and expenses.²

§ 485 a. In an action against a railroad company for negligence in not conveying a quantity of butter to market within a reasonable time, the plaintiff cannot recover, as damages, the difference between the price of butter at the time it should have been delivered, and its price at the time when the butter in question was in fact delivered. The case disclosed nothing by which it could be said whether the price of the butter would or would not decline, or whether the parties contemplated either event. The market was fluctuating, and either event was entirely uncertain and contingent.³

§ 486. Where a libel in the admiralty was filed against a vessel for the non-delivery by the master of a cargo at Velasco, it appeared that the vessel arrived out, and that the consignee refusing to receive it, the master, contrary to his duty, carried it on to New Orleans. It was held, that the libellants were entitled to

¹ *Watkinson v. Laughton*, 8 Johns. 213. The same rule, with the same modification in respect to interest, was laid down in *Amory v. M'Gregor*, 15 Johns. 24. The defendant, a common carrier, had undertaken to carry by water certain merchandise from Cincinnati to Tiptonsport, on the Wabash River; the measure of damages was held to be the wholesale

value of the merchandise at the place to which they were to be carried, deducting the price of freight. *Wallace v. Vigus*, 4 Blackf. 260. The rule was held to be the same in Ohio, in *McGregor v. Kilgore*, 6 Ohio, 358.

² *Nourse v. Snow*, 6 Greenl. 208.

³ *Wibert v. New York R.* 19 Barb. 36.

(a) *Lakeman v. Grinnell*, 5 Bosw. 625. Interest was allowed in *Spring v. Haskell*, 4 Allen, 112.

recover the actual value at Velasco, at the time when the cargo should have been landed there, deducting all duties and charges, and the freight for the voyage, as if the cargo had been duly landed. Mr. Justice Story, in this case said, that the rule adopted in prize cases, of an addition of ten per cent to the price cost of the cargo, did not apply to cases like this; that rule ordinarily supposing that the vessel has been captured before she arrived at the port of destination, and the court making the presumption of the additional value of ten per cent *in odium spoliatoris*.¹

§ 487. The case of *Bridge v. Austin*, in Massachusetts, was decided upon its own peculiar circumstances. It was an action against the defendant for receiving the plaintiff's goods as his bailiff, and taking on himself to carry them safely from Boston to Charleston, in South Carolina. The defendant engaged to dispose of them at Charleston on account of the plaintiff, and pay him the proceeds, and expressly took upon him all risks, except those of the sea, and was to have a commission of five per cent. It was also an important circumstance, that the goods (a box of linens) were declared in the defendant's written receipt and engagement to amount to the sterling cost of eighty-four pounds, six shillings, and one farthing. The linens arrived safe, and were delivered by the captain to the defendant at Charleston, where they were stolen, without his fault, before he had an opportunity of selling them. He was held to be liable according to their value at Boston, deducting five per cent commission. In this case the defendant was supercargo, and his engagement seems to have been in the nature of an insurance in a valued policy.²(a)

§ 488. As it respects the mode in which the value of the article is to be arrived at, the fair test of its value, and consequently of its loss to the owner (assuming that there is no defect in the

¹ *Arthur v. Schooner Cassius*, 2 Story, 81. and comment on the decision by Chief Justice Tilghman, in *Gillingham v.*

² *Bridge v. Austin*, 4 Mass. 114, Dempsey, 12 S. & R. 187.

(a) In *Lakeman v. Grinnell*, 5 Bosw. 625, goods purchased in Connecticut were put on board a vessel in New York to be carried to Liverpool. Before the vessel sailed she was destroyed, together with the goods, by an accidental fire. *Held*, that the value of the goods in New York was the measure of damages. See also *Krohn v. Oechs*, 48 Barb. 127.

quality), is its price at the time in the market. Thus, in an action against a common carrier for negligently transporting mulberry-trees of the Alpine species, the market value of the trees at the time, however fictitious, was held the standard of damages; and that the range of prices in the entire market, and the average thus found, was the test, and not any sudden inflation.¹

§ 489. Where a box of gold sovereigns was shipped to be carried for hire from New York to Mobile, and the vessel was wrecked on the "Hondu Reefs," and the box was lost, in a libel in the admiralty to recover its value against the captain and owners, the libellants asked to have the value of the sovereigns allowed them as if the coin had arrived at Mobile. But it was held, that, as the sovereigns were not carried to Mobile, and might never have arrived there, the true test was their value at Key West, with interest upon the value from the time when proceedings for salvage were instituted at Key West. That date was adopted as allowing the captain full time to have ascertained all the facts which were within the reach of an interested and vigilant master and owner.² (a)

§ 490. In case of the acceptance of the goods short of the place of destination, that is no bar to an action for damages which before arose from the carrier's negligence; but the acceptance may be given in evidence in mitigation of damages, so as to limit the recovery to the actual loss sustained by the owner.³ (b)

§ 490 a. For a non-delivery of goods within a reasonable time, the carrier of them is only responsible for reasonable consequences of his breach of contract. (c) Thus, where the plaintiff sent

¹ *Smith v. Griffith*, 3 Hill, 333.

² *Bowman v. Teall*, 23 Wend. 306.

³ *King v. Shepherd*, 3 Story, 349. And see *ante*, § 333.

(a) If gold coin is shipped as a commodity and is lost, the measure of damages is the market value of the coin as a commodity. *Cushing v. Wells*, 98 Mass. 550. *The Patrick Henry*, 1 Bened. 292.

(b) *Atkisson v. Steamboat Castle Garden*, 28 Misso. 124. *Cox v. Peterson*, 30 Ala. 608. *Lowe v. Moss*, 12 Ill. 477.

(c) Where goods are not delivered in a reasonable time, the measure of damages is any reasonable loss and expenses occasioned by the delay, together with the value of the goods at the time and place they should have been delivered, less their value at the time and place of actual delivery or tender. *Nettles v. S. Car. R.* 7 Rich. 190. See *Hackett v. Boston R.* 35 N. H. 390; *Galena R. v. Rae*, 18 Ill. 488; *Weston v. Grand Trunk R.* 54 Me. 376. In

certain goods by the defendants, who were carriers, to be delivered at a particular place on a particular day, so as to be ready for market on another particular day, but did not give notice they were sent for that purpose; and on that day the plaintiff's clerk went there, and, owing to the non-delivery of the goods in season, he removed them to another place for sale; it was held, in an action for the non-delivery of the goods in a reasonable time, that the expenses so incurred might be given by the jury in damages. Whether the expenses, in such case, are reasonable or not, is entirely a question for the jury.¹ (a) If goods are injured in their transit from A to B, or if, after their arrival at the latter place, and before storage; the measure of damages, of course, is the difference between the value of the goods when delivered to the carrier, and the value of them in their damaged condition when received by the consignee at B.² (b)

¹ *Black v. Baxendale*, 1 Exch. 401.

² *McHenry v. Railroad Co.*, 4 Harring. Del. 448.

Scott v. Boston & New Orleans Steamship Co. 106 Mass. 468, cotton was delivered to be carried by a certain vessel, and bills of lading signed. The owner then sold it to arrive. Part of the cotton was left behind, and brought on and delivered by another vessel. *Held*, that the measure of damages was the difference in the market value between the time when it should have been delivered and when it was delivered, and not the difference between the time of the sale and the time of delivery. Where by a contract with a third party the shipper was to receive a certain sum for the goods, interest on this amount was allowed for the time of the delay, but a claim for money paid for insurance was rejected, as the vessel being unseaworthy the carrier was liable as an insurer. *Murrell v. Dixey*, 14 La. Ann. 298. If a carrier wrongfully refuses to carry goods, the measure of damages is the difference in value at the place of delivery, when, if carried, they should have reached there, and the value at the place whence they should have been carried, including the necessary expense of storage and deterioration, and deducting the reasonable expense of transportation. *Galena R. v. Rae*, 18 Ill. 488. For the rule of damages where a passenger is detained on his journey, see § 592.

(a) Expenses are not now allowed. *Woodger v. Great Western R. L. R.* 2 C. P. 318.

(b) If a carrier agrees to deliver perishable goods within a specified time, he is liable, in case of breach of contract, for the amount of profits which the goods might be expected to have realized if they had arrived in proper time. *Wilson v. York R.* at N. P. before Jervis, C. J., 18 Eng. L. & Eq. 557. If damaged goods are sold at auction by one party, it is not necessary to give notice of the sale to the other party, if the amount of the damage is clearly established. *Greenwood v. Cooper*, 10 La. Ann. 796. See *Henderson v. Ship*

12. The Parties to sue.

§ 491. The general rule of law in respect to all actions is, that the action should be brought in the name of the person whose legal right has been affected; a rule necessary to be observed, in order that the party suing shall not be compelled to abandon his suit after having incurred great expense.¹ (a) This general rule renders it important, before commencing an action against a carrier for his negligence or default in the conveyance of goods, to be particular in ascertaining in whom the property in the goods is vested; for, by assumption of law, he is the person who sustains the loss, and therefore, unless such inference of law is contradicted by the particular facts of the case, he is the party to demand compensation from him by whom he has been injured. There may be a special property in a third person, or a special contract between the consignor of goods and the carrier, which will rebut the presumption referred to;² (b) but otherwise the action must be brought in the name of the owner of the property. (c) Thus, if a father send a present to his child by a carrier,

¹ See 1 Chit. Pl. 1 *et seq.*

in *Griffith v. Ingledew*, 6 S. & R. 429.

² *Freeman v. Birch*, 2 Nev. & Man. 426. And see opinion of Gibson, J., explained, *post*.

Maid of Orleans, 12 La. Ann. 352; *Elkin v. New York Steamship Co.* 14 La. Ann. 647.

(a) It has long been the settled law that if a marine insurer of goods pays a loss occasioned by the act of a carrier, for which he is liable to the owner of the goods, an action will lie by the insurer in the name of the owner against the carrier. The same principle applies to insurance on land. *Hall v. Railroad Companies*, 13 Wall. 367.

(b) *Mayall v. Boston R.* 19 N. H. 122. A bailee of goods upon which labor is to be performed for compensation, the goods not being converted into something essentially different in their character, has only a special property in them, and this ceases on delivery of the goods to a carrier for the general owner. The bailee cannot therefore sue the carrier. *Morse v. Androscoggin R.* 39 Me. 285.

(c) In *Blanchard v. Page*, 8 Gray, 281, the question whether the shipper named in a bill of lading, who had no property general or special in the goods, could sue for an injury to them, was much considered; and after deciding in the negative, the court on a re-argument held that such an action would lie. And in *Finn v. Western R.* 112 Mass. 524, it was held that in the absence of an express agreement between the consignor and the carrier, the consignor might maintain an action for the loss of the goods, although they were the property of the consignee.

and it is lost, the father cannot maintain an action as owner; but the action must be brought in the name of the child.¹ (a)

§ 492. In general a mere servant or agent with whom a contract is made on behalf of another, and who has no direct beneficial interest in the transaction, cannot support an action thereon; but if he has a beneficial interest in the performance of the contract, or a special property or interest in the subject-matter of the agreement, he may support an action in his own name upon the contract, as in the case of a factor, or broker, or a warehouseman,² or carrier,³ or captain of a ship for freight.⁴ An agent in England shipping goods to the foreign principal, and paying the freight, can maintain an action on the bill of lading, if it express that the goods were shipped by the agent, and that the freight was paid in England; because a privity of contract is established between the parties by means of the bill of lading.⁵ In case of a bailment, it is clear that the bailee has such a continuing interest in the goods until their arrival at the place of destination as to entitle him to sue the carrier, in case they are lost or damaged on their passage. Thus, in *Freeman v. Birch*⁶ (which was an

¹ 2 Steph. N. P. 990. In *Hunter v. Westbrook*, 2 Car. & P. 578, a father gave his son a watch, and several articles of wearing apparel. It was held, that though the son was under age, viz., about sixteen years old, the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son; and Abbott, C. J., observed: "I believe it has been held, that things stolen from a child may be laid to be the property of the parent; but I think that has been the case in very young children." So also in *Smith v. Birch*, 7 Car. & P. 401, it was held, that if a father make to a son under age an absolute gift of an

article of dress or ornament, e. g. a watch, he cannot afterwards, without that son's consent, reclaim the gift; Mr. Justice Vaughn observing: "If the father had made an absolute, solemn, and irrevocable gift of the watch to his son, the plaintiff, and the plaintiff had accepted it, the law would not allow the father, without the consent of the son, afterwards to reclaim the gift."

² 1 Chit. Pl. 7.

³ *Ante*, § 348.

⁴ *Shields v. Davis*, 6 Taunt. 65. *Brown v. Hodgson*, 4 Taunt. 189.

⁵ *Joseph v. Knox*, 3 Camp. 320.

⁶ *Freeman v. Birch*, 1 Nev. & M. 420.

(a) In Massachusetts, personal apparel furnished by a husband to a wife, or purchased by the wife, with the consent of her husband, with money given her by him from a fund formed by their joint earnings, remains the property of the husband, and the wife cannot maintain an action against a carrier for the loss thereof. *Hawkins v. Providence & Worcester R.* 119 Mass. 596.

action on the case against a carrier for negligence), at the trial before Paterson, J., it appeared that the plaintiff, a laundress at Hammersmith, was in the habit of sending linen to and from London by the defendant's cart, which travelled from Chiswick to London; on one occasion a basket of linen belonging to one S. was sent by the defendant's cart, and on its way to London parts of the contents were either lost or stolen. S. did not pay the carriage of the linen; and it was objected on the part of the defendant, that the present action was misconceived, and that the action should have been brought by the owner of the linen. The learned judge overruled the objection, and a verdict was found for the plaintiff. Subsequently, a motion was made for a new trial, on the ground of misdirection, which the Court of Queen's Bench, however, refused, on the ground that, under the circumstances, the bailee must be taken to retain a special property in the goods sufficient to support the action. (a)

§ 493. Upon the decision in the case last cited of *Freeman v. Birch*, it has been remarked: "Though it clearly establishes the right of the bailee to sue, yet this must not be understood necessarily to exclude the bailor from the exercise of a similar right; supposing, that is to say, he chooses to step in and anticipate the bailee in bringing an action; a conclusion which seems to be deducible from the general state and condition of property under bailment, which is, as it were, *in dubio* between the parties, and vested for some purposes in the bailee, and for some in the bailor. The right of property being thus floating and undetermined, it

(a) See *White v. Bascom*, 28 Vt. 268. Where three persons were travelling together, and a valise was lost which belonged to one of them and which contained articles belonging to all, it was *held*, that the owner of the valise, having the key of it and control over it, could sue for all the articles in the valise. *Moran v. Portland S. P. Co.* 35 Me. 55. Where a box which contained goods, some of which belonged to A and some to B, was delivered on their behalf by a third person to a carrier addressed to A, and was carried and delivered to A, who paid for the carriage, it was *held*, that there was evidence of a joint bailment by A and B, and that both might sue the carrier for any loss sustained by them. *Metcalf v. London R.* 4 C. B. (N. S.) 307. In *Becher v. Great Eastern R. L. R.* 5 Q. B. 241, the plaintiff gave his portmanteau to his servant to take with him to a station on the defendant road. The servant bought a ticket and delivered the portmanteau as his own luggage. The plaintiff took a later train for the same place, and travelled without any luggage. *Held*, that he could not maintain an action for the loss of the portmanteau.

seems to follow that the right of action which arises from it must partake of the same properties, and must so continue until it is finally fixed and determined by one or the other party appropriating it to himself.”¹ (a) It cannot indeed be denied, that the right of an agent or a bailee, having a special property in the goods which are the subject-matter of the transaction, to sue for any default of the carrier in respect to them while in the course of transportation, is subservient to the right of the principal to interfere and bring the action in exclusion of the agent’s or bailee’s right.² The rule in such cases is stated by Parke, B., to be, that either the bailor or the bailee in such cases may sue; and whichever first obtains damages, it is a full satisfaction.³ (b)

§ 493 a. Where an action is rightly brought by the owners of goods against a carrier for negligence, the judgment in that action is a bar to a suit subsequently brought against the same carrier by a person having a special property in the goods.⁴

§ 494. It is also an important doctrine, that, if it is not expressed that an agent contracts in behalf of another, and the name of the principal is not disclosed by him, a suit may be maintained in the name of the principal. This doctrine has been acknowledged and applied in a number of instances;⁵ and was applied in the case of a common carrier in *Sanderson v. Lamberton*, in Pennsylvania.⁶ It was also very recently applied by the Supreme Court of the United States in an important case on appeal in the admiralty, in which the respondents were common carriers by sea. The case referred to originated in the loss of the steamboat “Lexington,” with the cargo on board, by fire, in Long Island Sound, in the month of January, 1840; but the decision was not made until the December term of that court, 1847. The property in question (a large amount of specie) was delivered to

¹ 1 Walf. on Part. to Act. 35.

² 1 Chitt. Pl. 8.

³ *Nicolls v. Bastard*, 2 Crompt. M. & R. 660.

⁴ *Green v. Clark*, 13 Barb. 57, Pratt, J., dissenting. (c)

⁵ Among others, in *Sims v. Bond*,

5 B. & Ad. 393; *Higgins v. Senior*, 8 M. & W. 834; *Taintor v. Prendergast*, 3 Hill, 72; *Lapham v. Greene*, 9 Vt. 407.

⁶ *Sanderson v. Lamberton*, 6 Binn. 129; and *ante*, § 466.

(a) *Elkins v. Boston R.* 19 N. H. 337.

(b) *Steamboat Farmer v. McCraw*, 26 Ala. 189.

(c) This case was affirmed in 2 Kern. 343.

one H., an "express" forwarder, for transportation; and by him delivered for that purpose to the New Jersey Steam Navigation Company, who, with other steamboats, ran the "Lexington" to and from New York and Stonington. It was held, that notwithstanding the contract of affreightment was made by H. with the company personally, and without disclosing the name of the libellants who were the owners of the specie lost, the suit by them against the company should be sustained.¹

§ 495. The question in respect to consignors and consignees of goods forwarded from one to the other, and as to which of the two parties is the proper party to bring the action for a loss or non-delivery of the goods while in the course of transportation, is sometimes one of much nicety, and has therefore occasionally provoked critical discussion. The carrier must be liable to one party or the other, and if the wrong party were to recover against him he would be liable to be harassed again.² It is important to look, in endeavoring to decide which is the proper party, to the state and condition of the property, and the relation in which the consignor and consignee stand to it;³ for neither the consignor nor consignee, as such, is the proper party to bring the action.⁴ The relations in which they stand to each other may be reduced to three general heads. 1st. Where the entire property in the goods remains vested in the consignor; 2d. Where it is in the consignee; 3d. Where, as in the cases which have already been cited, both are interested, the one as general and the other as special owner. In the first case, the law presumes the consignor to be the party who contracts with the carrier, and therefore vests in him all rights of action arising out of such contract.⁵ (a)

¹ *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; and *ante*, § 466.

² *Per Williams, J., in Coats v. Chaplain*, 3 Q. B. 489.

³ 1 Walf. on Part. to Act. 31 *et seq.*

⁴ See opinion of Bronson, J., in *Everett v. Saltus*, 15 Wend. 474; *Law v. Hatcher*, 4 Blackf. 364.

⁵ 1 Walf. on Part. to Act. 33. See *D'Wolf v. New York Ins. Co.* 2 Johns. 214; *Bank of Rochester v. Jones*, 4 Comst. 407; and see *ante*, § 397.

(a) *W. & A. Railroad v. Kelly*, 1 Head, 158. In *Coombs v. Bristol R. 3 H. & N. 1*, the declaration alleged a contract by the defendants with the plaintiff to carry goods; that the goods were the plaintiff's, and that they were lost. The defendants pleaded that the goods were delivered to them by A, to be delivered to plaintiff; that the goods had been lost; that A as con-

If goods are in the course of transmission from a principal to an agent, for any loss or damage occurring to such goods in the course of their passage, the principal would seem to be the proper party to sue.¹ Where goods are sent by a party merely to be approved, the property not passing to the consignee until he receives and adopts the goods, the consignor is entitled to bring the action against the carrier for any breach of his implied undertaking to deliver the goods.² Thus, a coat ordered by a customer, resident abroad, without instruction as to the mode of conveyance, and which was sent through by the tailor, who paid the freight, and the coat being lost in the transit, it was held that the vendor was the proper party to sue the carrier.³

§ 496. Again, if from fraud, or non-compliance with the requisites of the statute of frauds, no actual sale has taken place so as to transfer the right of property and the risk of loss from the consignor to the consignee, the consignor is, of course, the proper party to maintain the action. Thus, where the consignor had delivered goods to a carrier in obedience to a fictitious order, which professed to come from a well-known tradesman of respectability, but had in reality been sent by a swindler, it was held that as no *bonâ fide* sale had taken place, the consignor had not been divested of his property in the goods, and that he was, therefore, the proper party to sue the carrier for a neglect of duty in delivering to the swindler, who applied for them at the carrier's office, instead of delivering them at the residence of the tradesman to whom they were directed.⁴ So, if a tradesman sends goods of the value of £10 and upwards, pursuant to an oral order, or an oral contract of sale, to a person who has not given "earnest," or made a part payment, or accepted any part of the goods, and the contract is void by reason of non-compliance with the statute of frauds, then, as there has been no actual sale, so as to transfer

¹ Wright v. Snell, 5 B. & Ald. 350.
Sargent v. Morris, 3 B. & Ald. 277.

³ Goodwyn v. Douglas, 1 Cheves, 174.

And see opinion of Gibson, J., in Griffith v. Ingledew, 6 S. & R. 429.

⁴ Duff v. Budd, 6 Moore, 469.
And see also Stephenson v. Hart, 4

² Swain v. Shepherd, 1 Moody & R. 224.
Bing. 476.

signor had claimed compensation; and that the defendants had paid him the full value. On demurrer, the plea was *held* bad. It will be noticed that the plea did not deny that the contract was made with the plaintiff.

the right of property and the risk of loss to the consignee, the consignor is the party to sue the carrier.¹

§ 497. But by the delivery of the goods to a carrier on behalf of the consignee, and if they have been placed at his absolute disposal, and no other fact appears, the legal presumption is, that he is the true owner, and the property in the goods then becomes immediately vested in him; and, therefore, in the event of a loss, he, and not the consignor, must bring the action, for the consignor has his remedy against the purchaser.² (a) “Generally speaking,” says Smith,³ “when goods are forwarded in pursuance of an order which binds the person giving it to receive the goods, as the property in them passes to that person, by the delivery to the carrier, he is the proper plaintiff, if they should be lost.”⁴ Lord Alvanley is reported to have said, that it appeared to him a proposition as well settled as any in the law, “that if a tradesman order goods to be sent by a carrier, though he does not name any particular one, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods, and if any accident happen to them, it is at his risk. The only exception to the purchaser’s right over the goods, is, that the vendor, in case of the former becoming insolvent, may stop them *in transitu*.”⁵ Under such circumstances the consignee alone must bring the action, whether the carrier be a carrier by land or a carrier by water;⁶ for a shipment of merchandise in the possession of a master of a vessel, during their passage from a consignor abroad to the consignee at home, accord-

¹ Coats v. Chaplain, 3 Q. B. 489. Stockdale v. Dunlop, 6 M. & W. 224.

² Vale v. Dale, 1 Cowp. 294. Dawes v. Peck, 8 T. R. 330. Everett v. Saltus, 15 Wend. 474. Richardson v. Dunn, 2 Q. B. 224. Bonner v. Marsh, 10 Smedes & M. 376. Ide v. Sadler, 18 Barb. 32. Canfield v. Northern R. 18 Barb. 586. Dows v. Cobb, 12 Barb. 310. White v. Vann, 6 Humph. 70. Bill v. Cowell, 3 Comst. 322.

³ Smith, Mer. Law, 290 (5th ed.)

The vendor was the vendee’s agent to employ the carrier.

⁴ And he cites Dawes v. Peck, 8 T. R. 330. Dutton v. Solomonson, 3 Bos. & P. 582.

⁵ Dutton v. Solomonson, 3 Bos. & P. 584. And see Jacobs v. Nelson, 3 Taunt. 423; Ilsley v. Stubbs, 9 Mass. 63.

⁶ See *ante*, §§ 79, 298; Bothlingk v. Inglis, 3 East, 394; Potter v. Lansing, 1 Johns. 215.

(a) Arbuckle v. Thompson, 37 Penn. State, 170.

ing to the agreement and course of dealing between the parties, operates as an actual delivery to the purchaser.¹ Where the purchaser of goods at Naples brought an action against the carrier for negligence in shipping them; the plaintiff, it appeared, sent an order to M. & Sons, of Birmingham, in England, for the goods in question to be dispatched on insurance being effected, the terms to be three months' credit from the time of arrival. On the part of the defendant it was contended, that, as the goods were not to be paid for until three months after delivery, they were not at the purchaser's risk until their arrival. The court, however, considered that the order for insurance was decisive as to the point that the goods were at the plaintiff's risk, and that, therefore, the action was properly brought in his name.²

§ 498. But in England, there has been no instance in which the right has been held to pass to the consignee, where he has not expressly directed the sending by some particular conveyance, or at least the sending by some conveyance or other.³ In *Coats v. Chaplain*, in the Queen's Bench, in 1842,⁴ it appeared that the travelling agent of M., a tradesman residing in London, ordered goods for M. of the plaintiff, a manufacturer at Paisley. No order was given as to sending the goods; the plaintiff gave them to the defendant's carrier directed to M., to be taken to him, and also sent an invoice by post to M., who received it. The goods having been lost by the defendant's negligence, it was held that the defendant was liable to the consignor.

§ 499. However, there are particular circumstances under which the possession of the carrier is not the possession of the vendee; and the rule laid down by Lord Kenyon, in *Dawes v. Peck*,⁵ that the question whether the consignor or consignee is the proper party to sue, must be entirely governed by the question in whom the legal right to the property is vested, is not

¹ *Brown v. Hodgson*, 2 Camp. 36. Where goods are purchased in a foreign country in pursuance of orders, the delivery on board the ship is a delivery to the merchant who ordered them; the property is vested by that act, and the merchant has no election to accept or reject them. *The Mary & Susan*, 1 Wheat. 471. But if a shipment be made without, or con-

trary to, orders, it still remains at the risk of the shipper. *The Francis*, 2 Gallis. 391.

² *Fragano v. Long*, 4 B. & C. 219.

³ Per Williams and Wightwick, JJ., in *Coats v. Chaplain*, 3 Q. B. 483.

⁴ *Ub. sup.*

⁵ *Dawes v. Peck*, 8 T. R. 332.

strictly accurate.¹ Undoubtedly, the person in whom the property of the goods is vested is, in general, the proper party to bring the action; but then he is so, not because the property is vested in him, but because, from that circumstance, the law presumes that he is the party who really contracts with the carrier, and that any other person employing the carrier acts only as his agent.² The rule is more properly stated by Parke, J., in *Freeman v. Birch*,³ that the person employing the carrier must bring the action, but that the circumstance of the legal right being in one person, may be evidence of employment by that person. Hence it follows, that in order to decide who is the proper party to be made plaintiff in an action of this nature, the first inquiry must be, whether any special agreement for the carriage of the goods in question exists. If there is none, it then becomes necessary to ascertain in whom the right of property is vested. In the former case, the remedy for any breach of contract belongs to the party with whom such agreement is made. Therefore, where the consignor agrees with the carrier for the conveyance of the goods, and is to pay him, the action is well brought in his name.

§ 500. Accordingly, it is found, that where any thing exists to contradict the legal presumption that the owner of the goods is the proper party to call for compensation, the owner ceases to be at least the sole party to bring the action. Where a special agreement is shown to exist between the consignor and the carrier, that the former is to pay for the conveyance of the goods, it is no answer to an action brought by the consignor against the carrier upon such special agreement to say, that he is not the owner of the goods. In such case, the action may be brought either by the consignor with whom the express engagement was made, or by the consignee as the owner of the goods in whose behalf it was made.⁴

§ 501. In *Joseph v. Knox*,⁵ the consignor (the plaintiff) having received goods from Amsterdam to be transmitted to the consignee in Surinam, shipped them on board the defendant's ves-

¹ See Walf. on Part. to Act. 32.

² See opinion of Gibson, J., in *Griffith v. Ingledew*, 6 S. & R. 429.

³ *Freeman v. Birch*, 1 Nev. & Man. 420.

⁴ *Davis v. James*, 5 Burr. 2680.

Moore v. Wilson, 1 T. R. 659. *Robinson v. Dunmore*, 2 Bos. & P. 416.

And see *ante*, § 492.

⁵ *Joseph v. Knox*, 3 Camp. 320.

sel upon a bill of lading which stated that the goods were shipped by the plaintiff, that they were to be delivered in Surinam to the consignee or his assigns, and that the freight was paid by the plaintiff in London; it was held by Lord Ellenborough, that the defendant, after having signed such a bill of lading, could not bring the ownership of the goods in question; the consideration upon which the contract was founded moved from the plaintiff; the undertaking was made to him, and he was therefore entitled to maintain the action to recover the value of the goods, and would hold the sum recovered as a trustee for the real owner.¹

§ 502. If, after the carrier has fulfilled his part of the contract by conveying the goods to the place to which they are directed, it should appear that there is no such person as the one to whom the goods are addressed, then a new contract arises by implication of law between the carrier and the consignor; the carrier holds the goods as the bailee of the consignor, and is bound to take due care of them, and to deliver them to the consignor on being paid his fair and reasonable charges.²

§ 503. There is, says Lord Tenterden, some difficulty in deciding to whom the master and owners of a vessel are responsible on the contract evidenced by the bill of lading; and whether actions for loss or injury occasioned by their negligence or misconduct should be brought by the consignor or consignee.³ But to contracts for the carriage of goods by sea when they are founded on a bill of lading, the general principles which are above laid down will be found to apply; the only difference being, that in the case of a bill of lading that must first be resorted to as the medium of proving the intention of the contracting parties.⁴ It is true, however, that upon this subject there is some degree of confusion and contradiction in the cases;⁵ but there can be no doubt that a consignment as evidenced by the bill of lading is to be controlled and explained by the evident intention of the parties.⁶

¹ See also *Hart v. Sattley*, 3 Camp. 528.

² *Stephenson v. Hart*, 1 Moore & P. 375.

³ *Abbott on Shipp.* (5th Am. ed.), 402, 403.

⁴ 1 Walf. on Part. to Act. 37.

⁵ Per *Tompkins, J.*, in *Potter v. Lansing*, 1 Johns. 225.

⁶ See *Ludlow v. Browne*, 1 Johns. 1; *Coleman v. Lambert*, 5 M. & W. 502; *Hibbert v. Carter*, 1 T. R. 768; *Low v. D'Wolf*, 8 Pick. 101; *Allen v. Williams*, 22 Pick. 297. It has been

§ 504. It was held in *Sargent v. Morris*,¹ that where a merchant ships goods on his own account addressed to his correspondent, — there being nothing in the course of dealing between the parties to show an intention that the consignee should take any interest in the consignment, — the shipper or consignor, and not the consignee, ought to bring the action. On the other hand, it has been held in Pennsylvania, that where A, of Liverpool, shipped goods which, by the bill of lading, were to be delivered to B, or his assigns, in Philadelphia, and the goods belonged to A, and the freight was payable in Liverpool, sufficient property for the support of the action was invested in B, the plaintiff. But from the opinion of the rest of the court, Mr. Justice Gibson dissented; and the doctrine he deduced from an elaborate review of the authorities was, that the discriminative circumstances were, 1st, an engagement to pay the freight by the person who brings the action; 2d, an order by the consignee to deliver the goods to any or a particular carrier, for account and risk of the consignee. And, as a consequence of this, 3d, not merely the legal property but a beneficial interest in the goods existing in the person who brings the action; in all which the learned judge considered the case made out by the plaintiff was deficient. Neither of the above circumstances, he asserted, had ever been considered the substantive ground of the action, but only evidence whether the contract was made by the carrier with the consignor or with the consignee. Admitting, said he, that the consignee might have maintained trover on any action founded on property,

held by the Court of Errors and Appeals in Alabama, that where goods are shipped, and a bill of lading taken by the shipper, and delivered to the vessel for the consignee, the title to the goods is not thereby necessarily vested in the consignee absolutely; that it depends on the intention of the parties; that if made for the purpose of passing title, the delivery of the bill of lading will have that effect; but if, on the other hand, there be no contract of purchase between the consignor and consignee, the owner's title will not be divested. *Bonner v. Marsh*, 10 Smedes & M. 376. And see *Abbott on Shipp.* (5th Am. ed.) 402–

416; *Craven v. Ryder*, 6 Taunt. 433. It was shown by *Tompkins, J.*, in *Ludlow v. Browne*, *ub. sup.*, that the consignment was open to explanation, whether made to the consignee, or for account and risk of consignor. The case of *Hibbert v. Carter*, 1 T. R. 746, decides, that the correct rule is, that the transfer of a bill of lading to a creditor *primâ facie* conveys the whole property in the goods from the time of its delivery; but it also decides, that if the parties only intended to bind the proceeds, the right of property in the thing is not divested.

¹ *Sargent v. Morris*, 3 B. & Ald. 277.

yet the action here was not founded on property, but on contract and that, therefore, an interest in the property, which did not draw after it an interest in the contract, was insufficient.¹

§ 505. In *Potter v. Lansing*, in New York,² it was held, that if goods be shipped "for the account and risk of the consignee, he paying the freight," and it is so expressed in the invoice and bill of lading, the delivery to the carrier is a delivery to the consignee, who alone can bring the action against the carrier, in case they are not delivered. It did not expressly appear that the goods had been delivered by the order of the consignee, but that fact (on which it has been contended the correctness of the decision most certainly depends)³ seems to have been assumed by the court; for *Tompkins, J.*, in delivering the opinion of the majority, goes on the ground that delivery to the carrier had divested the property of the consignor and cast the risk on the consignee; an effect that could be produced only by a delivery to order.⁴

§ 506. The right of action upon simple contracts is not confined, as in deeds, to the person with whom the contract is in terms made, but the person for whose use such a contract has been entered into may maintain an action thereon, although the contract is not in express terms made with him, but with another in his behalf; and, therefore, if the bill of lading be special, to deliver to A for the use of B, B ought to bring the action.⁵

§ 507. Where a bill of lading is signed in blank, and is subsequently filled up by the person to whom it is sent, by the consignor's authority, it has the same effect in vesting the property as if the particular name inserted had been by the consignor's direction; so that the consignee may, or may not, confer a right of property on a third person. A, of Brazil, being indebted to P. H. & Co., of New York, was requested by them to make a remit-

¹ *Griffith v. Ingledew*, 6 S. & R. 429. See, in support of the opinion of Judge Gibson, *Coats v. Chaplain*, 3 Q. B. 483, cited *ante*, § 498; *Joseph v. Knox*, 3 Camp. 320, cited *ante*, § 501; *Freeman v. Birch*, 1 Nev. & Man. 420, cited *ante*, § 499.

² *Potter v. Lansing*, 1 Johns. 215.

³ By Gibson, J., in *Griffith v. Ingledew*, *ub. sup.*

⁴ *Griffith v. Ingledew*, 6 S. & R. 429.

Dows v. Greene, 6 Barb. 72. *Grove v. Brien*, 8 How. 429. *Price v. Powell*, 3 Comst. 322. *Ashmead v. Bury*, 10 Barr. 154. That the goods must have been ordered by the consignee to entitle him to sue, see *Coats v. Chaplain*, 3 Q. B. 483, cited *ante*, § 498.

⁵ *Evans v. Martlett*, 1 Ld. Raym. 271. *Sargent v. Morris*, 3 B. & Ald. 277. *Powell v. Bradlee*, 9 Gill & J. 220. *Everett v. Saltus*, 15 Wend. 474.

tance in discharge of his debt; and he thereupon shipped goods on board a vessel bound to Salem, on his own account and risk, and sent therewith bills of lading, by which the goods were made deliverable to his own order, and which were indorsed by him in blank, and enclosed to H. & Co., of New York (successors of P. H. & Co.), with authority to fill up the blank and make the goods deliverable to themselves, or to such person as they might name, with power to receive the proceeds in satisfaction of A's debt to P. H. & Co. On the arrival of the vessel at Salem, the bills of lading were forwarded to H. & Co., who filled up the indorsement thereon by making the goods deliverable to C. H. & Co., of Boston, who were to receive and dispose of the goods and account for the proceeds thereof in payment of A's said debt. C. H. & Co. thereupon went to Salem, received the goods and entered them at the custom-house, gave bond for the duties, and became responsible for the freight. While the goods were in their possession the same were attached as the property of P. H. & Co.; whereupon C. H. & Co. brought an action of replevin against the attaching officer. It was held that the property in the goods had not vested in P. H. & Co., and that C. H. & Co. were entitled to maintain their action.¹

§ 508. In *Conard v. Atlantic Insurance Company*,² the bill of lading purported, on its face, to be a shipment by E. T. of a number of kegs of specie, for account and risk of the shipper; to be delivered at Canton to J. T., or his assigns. The court held, that by the well-settled principles of commercial law, the consignee, under these circumstances, was constituted the agent of the owner, whoever he might be, to receive the goods, and by his indorsements of the bill of lading to a *bonâ fide* purchaser for a valuable consideration, without notice of any adverse interests, the latter becomes, as against all the world, the owner of the goods. This is the result of the principle, that bills of lading are transferable by indorsement, and thus may pass the property. (*a*) But if the shipper be the owner, and the shipment be made on his

¹ *Chandler v. Sprague*, 5 Met. 306.

² *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 445.

(*a*) See *The Thames*, 14 Wall. 98; *Meyerstein v. Barber*, L. R. 2 C. P. 38, 661; *Barber v. Meyerstein*, L. R. 4 H. L. 317; *Shepherd v. Harrison*, L. R. 5 H. L. 116.

own account and risk, although he may not pass the title by virtue of a mere indorsement of a bill of lading, unless he be the consignee, or, what is the same thing, it be deliverable to his order yet by any assignment, either on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons except such a purchaser for a valuable consideration, by an indorsement of the bill of lading itself. In the case above mentioned, E. T. was the owner of the goods and the consignee was merely his factor; he, therefore, had full power, notwithstanding the consignment, to pass the title to the property in the bill of lading, by a suitable instrument of assignment against anybody but a purchaser without notice from his consignee, without any actual delivery of the goods themselves, if they were then at sea, and incapable of manual tradition.¹

§ 509. In an action against a common carrier, where it appeared that the plaintiffs directed J. L. to barter certain chairs for a bale of handkerchiefs, and ship them on board the defendant's packet, to be transported to the plaintiffs; J. L. had the bale delivered on board the packet in order that it might be carried and delivered to the plaintiffs, and they retained certain moneys of J. L. in their hands, arising from the sale of butter consigned to them, to the amount of the price of the bale of handkerchiefs, as and for satisfaction. Evidence being given that the recovery in the cause was for the use of J. L., it was held that the action could be sustained.²

§ 510. Where a consignee at Liverpool, on receipt of a bill of lading, by which goods actually laden at Longford were made deliverable to certain persons in Dublin, "in care for, and to be shipped to" him, accepted, on the faith of the consignment, a bill of exchange, it was held that the bill of lading was evidence of an intention, on the part of the consignor, at the time of the lading, to vest in the consignee the property in the specific chattels laden, and that he might maintain an action of trover for them against a person to whom they had been delivered, under a subsequent order of the consignor.³ The case in respect of the goods thus actually laden at the time the bill of lading was signed, was distinguished from those in which there was no documentary or

¹ See also *Nathan v. Giles*, 5 Taunt.

558; *Allen v. Williams*, 12 Pick. 297; *J. 206*.

Low v. D'Wolf, 8 Pick. 101.

² *D'Anjou v. Deagle*, 3 Harris &

³ *Bryans v. Nix*, 4 M. & W. 775.

other evidence to prove an intention on the part of the consignors to vest the property in the consignee at the time of the delivery to the carrier.¹ And in the same case it was held that goods, which were proved not to have been actually laden, or specifically appropriated to the consignee when the bill of lading was given, had not vested in him.

§ 511. Goods may be shipped to the order and “on account and risk” of the assignee as a purchaser, and yet his right to the possession of them be incomplete.² Between the consignor and consignee, the agreement or intention may be, that the property in the goods shall not vest in the latter, until bills of exchange drawn for their amount on the consignee, or on other parties, be accepted. When this is the case, the master will generally be required to sign bills of lading to deliver the goods to the orders of the shipper, by whom, one part, unindorsed, will be forwarded to the consignee, to notify the shipment, another part, indorsed to the agent of the consignor, to be delivered to the consignee, when the condition of the consignment has been performed, by the acceptance of the bills of exchange.³ Where the direction is not to deliver the goods in case of the existence of certain circumstances, nor until payment should be made by the consignee in cash, the property in the goods continues in the consignor.⁴ Even after a shipment has been made, and a bill of lading making the goods deliverable to a consignee, by name, has been signed, the consignor and owner of them may attach conditions to the consignment, or revoke it at any time before the bill of lading or the goods are actually delivered to the consignee.⁵ It thus appears that the mere shipment of goods does not always vest the property of them in the consignee, though he be a purchaser.⁶

§ 512. Upon a shipment of goods to be sold on joint account

¹ *Kinloch v. Craig*, 3 T. R. 119, 783. *Williams v. Everett*, 14 East, 582. *Nichols v. Clint*, 3 Price, 547. *Bruce v. Wait*, 3 M. & W. 15.

² *Abbott on Shipp.* (5th Am. ed.) 404. *Wilmshurst v. Bowker*, 5 Bing. N. C. 51.

³ *Abbott, ub. sup.* *Brandt v. Bowlby*, 2 B. & Ad. 932.

⁴ *The Merrimack*, 8 Cranch, 317. *Andsee Ludlow v. Browne*, 1 Johns. 1.

⁵ *Mitchel v. Ede*, 3 Per. & D. 513; 11 A. & E. 88. In this case, although the consignor was indebted to the consignee, there was no agreement between them that the goods should be consigned, or advices that they had been consigned in reduction of the balance due.

⁶ *Abbott on Shipp.* (5th Am. ed.) 407.

of the consignee and consignor, or of the latter alone, at the option of the consignee, the right of property does not vest in the consignee until he has made his election under the option given him.¹

13. The Parties to be sued.

§ 513. The action for the loss of goods delivered to a carrier in consequence of the negligence of the carrier's servant, such as a driver or porter, must be brought against the carrier, and will not lie against the servant. Or, as is stated by a learned writer, "An action for negligence of this nature must be brought against the principal, and not against an agent employed in the conduct of the master's business, although the loss has resulted from the negligence of the latter."² But if it appears that the contract was made with the servant alone, and independently of the principal, and the servant expressly undertook, on his own account, to carry the lost parcel, he will then become liable to an action as the driver of a wagon or stage-coach, carrying parcels on his own account.³

§ 514. In *Williams v. Cranston*,⁴ where a watch was delivered to the driver of a stage-coach to be carried, it was held by Lord Ellenborough to charge the principal and not the servant; and the action being against the servant only, the plaintiff was nonsuited. The learned judge said: "I accede to the proposition, that, if the defendant could be considered as having taken the watch to be carried on his own account, for a reward to be paid to him, he would be liable, although he acted in fraud of his master. If it could be shown that he had been in the habit of conveying parcels for hire, the case would certainly be altered; but being the mere servant, it cannot be inferred that he took the parcel to be carried for hire and reward, without further proof. The only fact is, that he was the driver of the coach; no contract has

¹ *The Venus*, 8 Cranch, 253.

² Stark. Ev. (3d Lond. ed.) 284. And see also 2 Greenl. Ev. § 212; *White v. Boulton*, Peake, 81. That it is a part of the responsibility of the carrier to be answerable for the acts of his servants, see *ante*, §§ 91, 146. Where a parcel carried from Bath to Bristol was delivered by the mail-guard to a porter, who received a

proportion of the portage, the rest being paid to the proprietors of the inn where the coach stopped, for booking, it was held that the porter, being a mere servant, was not liable to be sued for the loss. *Cavenagh v. Such*, 1 Price, 328.

³ See *ante*, §§ 76, 77.

⁴ *Williams v. Cranston*, 2 Stark. 82.

been proved, there is nothing to indicate that the defendant received the parcel otherwise than in the character of a servant. I should have been glad if the case could have been carried further. At present the loss appears to have resulted from the negligence of the master through the medium of his servant." It would have been otherwise if the servant had undertaken to carry for hire on his own account, although in fraud of his master.¹

§ 515. Where an agent does not pursue in any degree the principal's authority; or so far exceeds it as to discharge the principal from responsibility for his acts; or where he acts under an authority which he knows the principal has no right to give, as an agent selling property under a notice that it does not belong to his principal; he (the agent) is personally liable to be sued.² As a general rule, an act done for another by a person not assuming to act for himself, but for another person, though without any precedent authority, becomes the act of the principal, if subsequently ratified by him. Where, however, a person does not at the time assume to act as agent, a party will not become liable by a subsequent ratification of the act.³

§ 516. Where two persons are jointly interested in the mode of conveyance (a wagon or stage-coach for instance), each is liable for the negligence of an agent in conducting it; although, by a subordinate arrangement between themselves, each undertakes the management of the vehicle by his own driver and his own horses for specified distances.⁴

§ 517. In respect to the joinder of parties as defendants, it is now settled with regard to carriers, that where the action is laid in tort, and is founded on a breach of common-law duty, it is several in its nature, and is maintainable against some only of those against whom the action is brought. But where the dec-

¹ *Beauchamp v. Powley*, 1 Moody & R. 38.

² 1 Chitt. Pl. (10th Am. ed. 35 a.) *Semble*, that the owner of fixed property, who enters into a contract for its repairs, and parts with all control over the conduct of them, is not liable for any mischief which the contractor may occasion in the progress of the work by negligently depositing materials in the highway in the neighbor-

hood of the property, or other acts of a like nature. *Burgess v. Gray*, 1 C. B. 578.

³ *Broom on Part. to Act.* 260. *Wilson v. Furman*, 6 Scott, N. R. 894. And see *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, *ante*, § 494; *Chase v. Debolt*, 2 Gilman, 371.

⁴ *Waland v. Elkins*, 1 Stark. 272, *ante*, § 93.

laration is in assumpsit and is founded in contract, the plaintiff must prove a joint promise, as by proof that all the defendants were proprietors.¹

§ 518. An exception to the general rule as to the non-liability of the agents of carriers to be sued for nonfeasance is established by the principles of maritime law, by which the master of a ship is regarded not as the mere servant of the owners, but rather as an independent officer; and consequently he, as well as the owners, is personally responsible for the loss or damage of the property intrusted to his care. (a) The goods are in his custody as soon as they are put on board the vessel,² and he is bound to deliver them in the same state in which they were shipped, unless they have become damaged by some inherent defect.³ In short, it may be laid down as the general rule, that the master is liable to an action when any loss occurs, if not occasioned by the act of God, perils of the sea, or the public enemy. Unless there is some special contract with the owners, the plaintiff has his election to sue either the master or the owners;⁴ if there is a special contract with the master, the

¹ The subject of misjoinder and nonjoinder of parties as defendants, has already been fully considered under another head. See *ante*, §§ 423 *et seq.*, 434 *et seq.*

² See *ante*, § 129, 130.

³ See *ante*, §§ 210, 211.

⁴ *Bac. Abr. Actions, B. Abbott on Shipp.* (5th Am. ed.) 300. *Marsh. on Ins.* 241. 1 *Walf. on Part. to Act.* 930. It would be of inconceivable mischief and impediment in commer-

(a) In *Blaikie v. Stembridge*, 6 C. B. (N. S.) 894, affirmed in the Exchequer Chamber, 6 C. B. (N. S.) 911, an action was brought against the master of a vessel for alleged negligence in loading goods on board. The vessel was at the time under a charter-party, by the terms of which the stevedore was "to be appointed by the charterer, but to be paid by and to act under captain's orders." The vessel was put up by the charterer as a general ship. The master did not interfere with the stevedore or give him any orders, and he was not on board when the plaintiff's goods were taken on board. The court *held*, that even if the stevedore was guilty of negligence, the master was not liable, the stevedore not being his agent, and that a person sending goods to be loaded on board a general ship is not entitled to assume, without inquiry, that his goods are to be shipped and stowed by the master rather than by a stevedore, and that, without any contract with, or wrong done by, the master and crew, the master is not liable. See *Sack v. Ford*, 12 C. B. (N. S.) 90; and *Sandeman v. Scurr*, L. R. 2 Q. B. 86, cited *ante*, § 212. A master of a steamboat on a river in North Carolina is merely an agent of the owners of the boat, and is not jointly liable with them. *Walston v. Myers*, 5 Jones, 174.

owner is not liable; and, on the other hand, if there is a special contract with the owner, the master is not liable.¹

§ 519. When goods are sent on board a vessel, the master, or person on board acting for him, usually gives a bill of lading, upon which the action may be either against the master or owner, though in the shipment of them such a document is not necessary.² By this instrument of contract, though made personally with the master, and not with the owners, both he and they are separately bound to the performance of it;³ and if the

cial dealing, if a foreign merchant, making a contract of freight with the master, should be compelled for any consequential injury to seek out the owners. The law, therefore, in order to avoid this inconvenience, gives all who deal or contract with the master the twofold remedy that they may proceed against either or both. 1 Holt, Law of Shipp. 379. *Boson v. Sandford*, Carth. 63. *Morse v. Slue*, 1 Vent. 190. Molloy says: "The master must see all things forthcoming that are delivered to him, let what will happen; the act of God, or an enemy, perils and dangers of the sea, only excepted." Molloy, b. 2, c. 2, § 2. Upon the principle of public policy, the master of a vessel, by the almost universal law of nations, as well as by the common law, is chargeable for all losses not arising from inevitable accident. The marine law lays down the rule with essentially the same strictness; and the civil law, the source in this instance of the marine law, was equally guarded, and placed masters of vessels and innkeepers under the like responsibility. The reason given in the civil law for the rule is, that it is necessary to confide largely in the honesty of masters of vessels, on account of the great opportunities they have to commit frauds, which it would be impossible to trace; and the courts in the United States have always considered masters of vessels liable as common carriers in respect to foreign as well as internal

voyages. See opinion of Kent, C. J., in *Elliott v. Rossell*, 10 Johns. 1. The policy of the law in making the master of a vessel liable for the non-delivery of goods lost during the voyage, without the fraud of the master, is to induce him to employ better men in his service. Per Spencer, J., in *Watkinson v. Laughton*, 8 Johns. 213. *M'Clure v. Hammond*, 1 Bay, 99; *Bell v. Reed*, 4 Binn. 127; *Schiefflin v. Harvey*, 6 Johns. 170, have proceeded upon the principle, that the master of a ship is liable, as a common carrier, for an embezzlement happening in the course of a foreign voyage. And see *Thorn v. Hicks*, 7 Cow. 697.

¹ *Ibid.*, and 1 Chitt. Pl. (10th Am. ed.) 35 a.

² 2 Saund. 119.

³ *Abbott on Shipp.* (5th Am. ed.) 396. *Stone v. Ketland*, 1 Wash. C. C. 142. *Bussey v. Donaldson*, 4 Dallas, 296. *Purviance v. Angus*, 1 Dallas, 184. *Abbott on Shipp.* (5th Am. ed.) 166, n. 1. Although the master and owner of a vessel are both liable to the merchant as carriers, for the loss of goods, yet they are liable only severally, and a joint action cannot be maintained against them. The master is liable in a different character and on a different ground. Where he has no property in the vessel, and has only the conduct and management of the vessel, he is the confidential servant or agent of the owners. They are bound by his contracts, by reason of their employment of the ship, and

action be against the owner, the form of declaration against the master will suffice, with very little alteration.¹ In cases of this

the profit which they derive from it by the receipt of the freight money. The master is liable on his own contract, also, for the transportation of the goods, and by virtue of his taking charge of them for that purpose. The liability of the master seems rather to be by express undertaking, even where the owners are known. By the court in *Patton v. Magrath*, 1 Rice, 162.

¹ The following is the form of a declaration against the captain of a ship on his bill of lading for the loss of goods, contained in 2 Chitt. Pl. (10th Am. ed.) 365 a. "For that whereas the said defendant before, and at the time of the making of his promise and undertaking hereinafter next mentioned, was the master and commander of a certain ship or vessel called the —, then in [the river Thames, and bound from thence to Liverpool, in the county of Lancaster], to wit, at, &c. (*venue*). And thereupon the said plaintiff heretofore, to wit, on, &c. (*the date of the bill of lading or about it*), in the river Thames aforesaid, to wit, at, &c. (*venue*) aforesaid, at the special instance and request of the said defendant (*let the following averment agree with the bill of lading*) caused to be shipped and loaded in and on board of the said ship or vessel, whereof the said defendant then was such master or commander as aforesaid, divers goods and merchandise, to wit, —, then in good order and well-conditioned (*these latter words are to be omitted, if not in the bill of lading*), of great value, to wit, of the value of £—, to be taken care of and safely and securely carried and conveyed by the said defendant as such master and commander as aforesaid, in and on board of the said ship or vessel, from [the river Thames] aforesaid, to [Liverpool] aforesaid, and there, to wit

at [Liverpool] aforesaid, to be safely and securely delivered in the like good order and well-conditioned for the said plaintiff (the dangers of the seas only excepted); and in consideration thereof, and of certain freight and reward to the said defendant in that behalf, he the said defendant then and there undertook, and faithfully promised the said plaintiff, to take care of, and safely and securely carry and convey, and deliver the said goods and merchandise as aforesaid (the dangers of the seas only excepted); and although the said defendant, so being such master of the said ship or vessel as aforesaid, then and there had and received the said goods and merchandise, to be carried, conveyed, and delivered as aforesaid, and although a reasonable time for the carrying, conveying, and delivering of the said goods and merchandise as aforesaid hath long since elapsed, and the said defendant hath delivered a part (*let this agree with the fact*) of the said goods and merchandise, to wit, — part thereof, for the said plaintiff, at [Liverpool] aforesaid; yet the said defendant, so being such master and commander of the said ship or vessel as aforesaid, not regarding his duty in that respect, nor his said promise and undertaking, but contriving and intending to deceive, injure, and defraud the said plaintiff in his behalf, did not, nor would take care of, and safely and securely carry or convey the residue of the said goods and merchandises so shipped in and on board of the said ship or vessel as aforesaid, from the [river Thames] aforesaid to [Liverpool] aforesaid, and there, to wit, at [Liverpool] aforesaid, safely or securely deliver the same for the said plaintiff (although no danger of the seas did prevent him from so doing), but on the contrary thereof,

nature, occurring within the limits of tide water, (a) there is, as we have seen, a remedy in the admiralty, which lies against the owner and against the ship itself, for the injury done, holding her responsible on account of the responsibility of the owner.¹

§ 520. This great responsibility, which the laws of commercial nations cast upon the owners for the acts of the master, has appeared, says Lord Tenterden, to many persons, at first view, to be a great hardship; but, says that learned writer, “lay-

he the said defendant, so being such master of the said ship or vessel as aforesaid, so carelessly and negligently behaved and conducted himself, with respect to the said residue of the said goods and merchandise, that by and through the mere carelessness, negligence, and improper conduct of the said defendant and his mariners and servants in that behalf, the said residue of the said goods and merchandise, being of great value, to wit, of the value of £——, became and was wholly lost to the said plaintiff, to wit, at, &c. (*venue*), aforesaid. And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*), aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there caused to be delivered to the said defendant, divers other goods and merchandise, to wit, goods and merchandises of the like number, quantity, quality, description, and value, as those in the said first count mentioned, to be taken care of, and safely and securely carried and conveyed by the said defendants in and on board of a certain other ship or vessel from [the river Thames] aforesaid, to [Liverpool] aforesaid, and there, to wit, at [Liverpool] aforesaid, to be safely and securely delivered, for the said plaintiff, for certain freight and reward to the said defendant in that behalf, he the

said defendant undertook and then and there faithfully promised the said plaintiff, to take due and proper care of the said last-mentioned goods and merchandise, whilst he had the care and custody thereof for the purpose aforesaid. And although the said defendant then and there had and received the said last-mentioned goods and merchandise for the purposes aforesaid; yet the said defendant, not regarding his duty in that behalf, nor his said last-mentioned promise and undertaking, but contriving and intending to injure and deceive the said plaintiff in this behalf, whilst the said defendant had the care and custody of the said last-mentioned goods and merchandise, for the purpose last aforesaid, took so little and such bad care of the same, that by and through the mere carelessness and negligence of the said defendant in that behalf, the said last-mentioned goods and merchandise, being of the value aforesaid, to wit, on the day and year aforesaid, became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*), aforesaid.”

[Add a general count for not taking care of the goods, as ante, § 435, concluding paragraph of note 3, and a count for money had and received, if it be supposed the defendant has received the proceeds of the goods.]

¹ See ante, §§ 419–422.

(a) Tide-water is not now the test of admiralty jurisdiction. See ante, § 419.

ing aside all considerations of the opportunities of fraud and collusion which would otherwise be afforded, it should always be remembered, that the master is elected and appointed by the owners: and by their appointment of him to a place of trust and confidence, they hold him forth to the public as a person worthy of trust and confidence; and if the merchants whom he deceives could not have redress against those who appointed him, they would often have just reason to complain that they had sustained an irreparable injury through the neglect or mistake of the owners, as the master is seldom of ability to make good a loss of any considerable amount."¹

§ 520 *a*. The statute of Indiana enacts that property of non-residents "shall be liable for the payment of debts or other demands, by suits to be instituted by process of foreign attachments." It was held that the property of the defendants (carriers) was liable by suit instituted by process of foreign attachment, for damage done to goods while on their transit.²

CHAPTER XI.

OF CARRIERS OF PASSENGERS.

1. Difference as to Liability between Common Carriers of Passengers and Common Carriers of Goods.

§ 521. THE carriage of persons as passengers, for hire, in public conveyances, is comparatively of modern practice; and although suits occurred against owners of coaches, for the loss of goods, as early as the time of Lord Holt, yet the first case, it seems, to recover damages by a person for injury done to him as a passenger, was tried in 1791, before Lord Kenyon.³ The case referred to was

¹ Abbott on Shipp. (5th Am. ed.) 374. And see *Fisher v. Consequa*, 2 Wash. C. C. 382; *In re Marty*, 2 Barb. 436; *Runyan v. Morgan*, 7 Humph. 210.
² *Bausman v. Smith*, 2 Cart. Ind. 1.
³ See opinion of Hubbard, J., in *Ingalls v. Bills*, 9 Met. 1.

White v. Boulton,¹ in which that learned judge, in delivering his opinion, said: "When these [mail] coaches carried passengers, the proprietors of them were bound to carry safely and properly." To carry "safely and properly," or "safely and securely," is the obligation which the law imposes upon a special carrier of goods for hire, or a carrier of goods for hire who is not a common carrier of goods. Common carriers of passengers, therefore, are subject to the same degree of liability as private carriers for hire of goods, which is a liability for all consequences resulting from the want of such care as the thing or person, under the circumstances of the case, requires. (a) But this undertaking, whether as implied by law, or as created by an express promise, does not insure against the forcible attacks of robbers.² And herein appears the difference, in respect to liability, between common carriers of passengers and common carriers of goods. The latter, as we have seen,³ are responsible for all damage which does not fall within the excepted cases of the act of God and the public enemy. The policy of the law which imposes this extraordinary responsibility, it is obvious, is

¹ *White v. Boulton*, Peake's Cas. 81.

² See *ante*, § 60.

³ *Ante*, Chap. VI.

(a) In an action by a passenger for injuries sustained by a carrier's negligence, the fact that the plaintiff has received money on an accident policy cannot be taken into account in reduction of damages. *Bradburn v. Great Western R. L. R.* 10 Exch. 1. A contract is implied, when one takes passage with a common carrier, that he shall pay for being carried, and that he shall be safely carried, and an express contract need not be shown. *Frink v. Schroyer*, 18 Ill. 416. See also *Great Western R. v. Braid*, 1 Moore, P. C. (N. S.) 101; *Thorne v. California Stage Co.* 6 Calif. 232. In *Austin v. Great Western R. L. R.* 2 Q. B. 442, the railroad was obliged to carry children under three years of age without charge, and was entitled to half fare for children between the ages of three and twelve. A woman with a child in her arms three years and two months old bought a ticket for herself, but none for her child. No question was asked as to the age of the child, and the jury found that there was no intention on the part of the mother to defraud the company. *Held*, that the child was entitled to recover for injuries sustained in consequence of the negligence of the defendants' agents in running the train. In *Buffit v. Troy R.* 36 Barb. 420, a railroad company ran a stage in connection with their trains to a village. *Held*, that the company was liable for an injury sustained by a person in the stage, who had entered it for the purpose of taking the cars, although he had not paid his fare, it being shown not to be the custom to pay fare until the stage arrived at the depot.

not applicable to the persons of passengers, although it is properly held to apply to the baggage they have with them;¹ it is to give security to property against clandestine combination with thieves, &c. And as the law holds a common carrier of goods to be an insurer, he is entitled, like other insurers, to demand a premium in proportion to the hazards of his employment.² In the words of Mr. Chief Justice Parker, of New Hampshire: "Carriers of passengers, for hire, are not responsible, in all particulars, like common carriers of goods. They are not insurers of personal safety against all contingencies, except those arising from the acts of God and the public enemy. For an injury happening to the person of a passenger by mere accident, without fault on their part, they are not responsible; but are liable only for want of due care, diligence, or skill. This results from the different nature of the case. (a) But in rela-

¹ *Ante*, §§ 107-117, 317-323.

² *Ante*, §§ 151-154. The rule of law which relates to the transportation of goods was changed as commerce advanced, from motives of policy, and

the strict rule above referred to, being introduced for general commercial objects, has no application to persons. *Boyce v. Anderson*, 2 Pet. 150. When the rule was changed, see *ante*, § 149.

(a) *Simmons v. New Bedford Steamboat Co.* 97 Mass. 361. *Galena R. v. Fay*, 16 Ill. 558. See, as to liability of a railroad for injury caused to a passenger by defect in a depot, *Martin v. Great Northern R.* 16 C. B. 179, 30 Eng. L. & Eq. 473; *Longmore v. Great Western R.* 19 C. B. (N. S.) 183; *Crafter v. Metropolitan R. L. R.* 1 C. P. 300; *Welfare v. Brighton R. L. R.* 4 Q. B. 693. In *John v. Bacon*, L. R. 5 C. P. 437, the defendant agreed to carry the plaintiff from one place to another by sea. The mode of transit provided was to go on to a hulk and there take a steamer. The hulk belonged to a third party, and the defendant had the use of it for his passengers. *Held*, that the defendant was liable for the negligence of the servants of the owner of the hulk whereby the plaintiff was injured. See for injury while passing to the cars from the ticket office, *Warren v. Fitchburg R.* 8 Allen, 227; *Caswell v. Boston & Worcester R.* 98 Mass. 194; *Chaffee v. Boston & Lowell R.* 104 Mass. 108; *Wheelock v. Boston & Albany R.* 105 Mass. 203; *McDonald v. Chicago R.* 26 Iowa, 124; *Burgess v. Great Western R.* 6 C. B. (N. S.) 923; *Chicago R. v. Dewey*, 26 Ill. 255. As to liability for allowing a ferocious dog in the depot, see *Smith v. Great Eastern R. L. R.* 2 C. P. 4. There should be a platform provided for the passengers to alight on. *Fay v. London R.* 18 C. B. (N. S.) 225. See further on this point, *Cockle v. London R. L. R.* 5 C. P. 457, affirmed in Exch. Ch. L. R. 7 C. P. 321; *Siner v. Great Western R. L. R.* 3 Ex. 150, L. R. 4 Ex. 117; *Bridges v. North London R. L. R.* 6 Q. B. 377, L. R. 7 H. L. 213; *Lewis v. London R. L. R.* 9 Q. B. 66; *Praeger v. Bristol R.* 24 L. T. (N. S.) 105; *Weller v. London R. L. R.* 9 C. P. 126;

tion to the baggage of their passengers, the better opinion seems to be, that they are responsible like other common carriers of goods."¹

§ 522. Attempts have, nevertheless, been made to extend the responsibility of carriers of passengers, as to their persons, to all injuries except those arising from the act of God or from the public enemy; but the support of the doctrine has been uniformly resisted, although a very strict responsibility as to the persons of passengers is imposed upon such carriers.² The car-

¹ *Bennett v. Dutton*, 10 N. H. 481. *v. Fry*, 4 Gill, 407; *Steamboat New And see Hawkins v. Hoffman*, 6 Hill, *World v. King*, 16 How. 469; *Phila-* 586; *Collett v. London R.* 16 Q. B. *delphia R. v. Derby*, 14 How. 468. 984, 6 Eng. L. & Eq. 305; *Stockton* ² *Aston v. Heaven*, 2 Esp. 533.

Holmes v. North Eastern R. L. R. 4 Ex. 254, affirmed in *Exch. Ch. L. R.* 6 Ex. 123; *Robson v. North Eastern R. L. R.* 10 Q. B. 271. In *Knight v. Portland R.* 56 Me. 234, the plaintiff bought a ticket in Lawrence, Mass., to go to Belfast, Maine. The ticket was composed of three parts, one from Lawrence to South Berwick over the road of another corporation, the second from South Berwick to Portland over the defendant's road, and the third from Portland to Belfast by a steamer of another corporation. The defendant's station was at the head of a wharf in Portland owned by the defendant, and the steamer was at the other end. The plaintiff was injured by a defect in the wharf while on her way from the station to the steamer. *Held*, that the defendant was liable as a carrier of passengers. But if there is a suitable platform on one side of a train of cars at a station, the railroad company is not liable if the passenger is injured in consequence of getting off on the other side. *Pennsylvania R. v. Zebe*, 33 Penn. State, 318, 37 Penn. State, 420. See, for injury to a passenger after alighting from the cars, *Bancroft v. Boston & Worcester R.* 97 Mass. 275; *Gaynor v. Old Colony R.* 100 Mass. 208; *Forsyth v. Boston & Albany R.* 103 Mass. 510; *Mayo v. Boston & Maine R.* 104 Mass. 137. As to the liability of a carrier for an injury inflicted by one passenger upon another, see *Pittsburg R. v. Hinds*, 53 Penn. State, 512; *Flint v. Norwich Transp. Co.* 7 Bl. C. C. 536, 34 Conn. 554; *Norwich Transp. Co. v. Flint*, 13 Wall. 3. If a person is on a car as a trespasser, he cannot lawfully be ejected while the car is going at such a speed as to make the act dangerous. *Lovett v. Salem R.* 9 Allen, 557. If a train stops in the night to wait until another train passes the point, a passenger who leaves the cars and falls into a cattle guard, and is injured thereby, cannot recover against the company, if he is not induced to go out by any person in the employ of the company. *Frost v. Grand Trunk R.* 10 Allen, 387. It is no defence to an action by a passenger against a carrier to recover damages for an injury sustained through the negligence of the carrier, that the negligence or trespass of a third party contributed to the injury. *Eaton v. Boston & Lowell R.* 11 Allen, 500. *Simmons v. New Bedford Steamboat Co.* 97 Mass. 368.

rier has not, and cannot have the same control over persons that he has over inanimate matter, and therefore the law regulating the responsibility of common carriers of goods does not apply to the carrying of human beings of no greater intelligence than that of slaves, a description of persons, who, in the nature of things, and in their character, resemble passengers, rather than packages of goods. Hence, the responsibility of the carrier of them should be measured by the law which is applicable to passengers, rather than that which is applicable to the carriage of common goods and chattels. A slave has volition and has feelings which cannot be disregarded, and properties of this nature it is impossible to overlook in conveying him from place to place.¹

§ 523. In the case of *The Camden and Amboy Railroad Company v. Burke*,² the court consider that the proprietors of public conveyances are liable at all events for the baggage of passengers; but as to their persons, they are liable only for the want of such care and diligence as is "characteristic of cautious persons."³ Such, then, is the difference in respect to responsibility, between common carriers of goods and chattels, and common carriers of the persons of passengers; the former being liable for all damage not occasioned by the act of God, &c., and the latter not being liable for any injuries, unless in case of the want of that circumspection and diligence which is "characteristic of cautious persons," where the limbs, lives, and health of human beings are at their control. There are, undoubtedly, certain risks which are incurred by all travellers in public vehicles, for which the proprietors of them are not responsible; and these are casualties which human sagacity cannot foresee, and

Story on Bailm. § 590; 2 Stark. Ev. (1st Am. ed.) 344; 2 Greenl. Ev. § 221. Sir James Mansfield, in *Christie v. Griggs*, 2 Camp. 79, says, there is a difference between a contract to carry goods and a contract to carry passengers; for the goods the carrier is answerable at all events, but he did not warrant the safety of his passengers; his contract with them was to provide for their safe conveyance, as far as human care and foresight would go. And see 2 Kent, Com. 600, 601; Hood

v. New York R. 22 Conn. 1; *Caldwell v. Murphy*, 1 Duer, 233; *Deevort v. Loomer*, 21 Conn. 245; *Brand v. Troy R.* 8 Barb. 368.

¹ *Boyce v. Anderson*, 2 Pet. 150. See also *ante*, § 122.

² *Camden R. v. Burke*, 13 Wend. 626.

³ See also the opinion of Chief Justice Marshall, in *Boyce v. Anderson*, 2 Pet. 155; *Stokes v. Saltonstall*, 13 Pet. 181.

against which the utmost prudence cannot guard. If, for instance, a gun should be fired so near a stage-coach as to frighten the horses, and they, becoming unmanageable, upset the coach and injure a passenger, he is without remedy as against the driver or his employers. But for damage done to goods in consequence of such an event, in the hands of a common carrier of them, he would be liable. Every wayfarer in a public vehicle must make up his mind to meet the risks incident to the mode of travel he adopts; risks which cannot be avoided by the utmost degree of care and skill in the preparation and management of the means of conveyance. A guaranty to this extent is the only one given for the protection of the wayfarer's person by the proprietors of the line.¹ But the liability of common carriers of passengers, as it has been determined and measured by courts of justice, will be better comprehended by first considering the duties, from a departure from which their liability proceeds.

2. Their Duty to receive Persons as Passengers.

§ 524. The distinction between a public or common carrier of persons and a private or special carrier of the same, is, that it is the duty of the former to receive all persons who apply for a passage. From the cases which establish that a person who represents himself to the public as a common carrier of goods cannot refuse to convey them from his accustomed place of setting out to his usual place of destination, provided he has room in his coach or wagon;² and also from the general principle recognized in instances similar to the carriage of passengers by public carriers of them (such, for example, as the case of an innkeeper who hangs out a sign and opens a house for travellers), it follows that there is an implied engagement on the part of public carriers of persons not to refuse those who apply for seats by their conveyance the privilege of travelling in such a manner, provided there is room for them, and a tender of, or offer to pay, the fare, is made at the time.³ The case of *Bretherton v. Wood* is a clear authority in favor of this view of the law;⁴ because, if the principle which exists in the case of carriers of goods be attended to, viz., that they are

¹ See the opinion of the court in *McKinney v. Niel*, 1 McLean, C. C. 540.

² See *ante*, §§ 123-125, 356.

³ That an absolute tender is not necessary, and that an offer to pay is enough, see *ante*, § 418.

⁴ See 5 Petersdorf, Abr. 48.

public servants, and therefore responsible for a refusal to perform their duties, it will be clear that carriers of persons are in this respect equally bound to attend to the interests of the community; the case referred to having established, that, in an action against stage-coach proprietors for an injury to a passenger by a coachman upsetting the coach, the declaration may be framed in tort for a breach of duty by negligence of servants. The court observed: "If it were that the present action was founded on a contract, so that to support it a contract between the parties to it must have been proved, the objection that is now made would be deserving of consideration. But we are of opinion that the action is not so founded. This is an action on the case against common carriers, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey goods and passengers safely and securely, so that by their negligence or default no damage or injury may happen. A breach of this duty is a breach of the law; and for this breach an action lies, founded on the common law, and which requires not the aid of a contract to support it."¹

§ 525. It is in fact beyond all doubt, that the first and most general obligation on the part of public carriers of passengers, whether by land or by water, is to carry persons who apply for a passage; and the obligation results from their setting themselves up, like innkeepers, and common carriers of goods, for a common public employment for hire. It is nevertheless true, that the obligation is subject to the qualifications that the regular fare be tendered, or there be an offer to pay it; (a) that there be sufficient

¹ *Bretherton v. Wood*, 3 Brod. & B. 54. Action against the defendant, who kept chaises for hire, for refusing to carry the plaintiff, who had his luggage tied on, and had got into the chaise, when the owner insisted on a previous payment of the hire which was charged exorbitantly. The plaintiff tendered him the regular fare, and the sum which had at first been agreed on to be taken, but afterwards refused. It was held by Lord Ellenborough,

that, although the owner might make his own regulation, or any special contract, and insist upon his own established mode of dealing, yet, after the person was in the chaise and tendered the money, it was too late to object to complete the journey; the owner of the chaise was bound to proceed; and if the jury found the tender, the plaintiff was entitled to recover. *Messiter v. Cooper*, 4 Esp. 260.

(a) *Day v. Owen*, 5 Mich. 520. See *Pearson v. Duane*, 4 Wall. 605; *Austin v. Great Western R. L. R.* 2 Q. B. 442; *Buffit v. Troy R.* 36 Barb. 420. A

room; that freshets in a river do not render it impracticable or dangerous to cross a ferry;¹ and that the applicant is not an unfit person to be received as a passenger, and that he had no design to injure the carrier in his business.² In *Jencks v. Coleman*,³ in which the defendant was captain of a steamboat, the subject of obedience to reasonable regulations came directly before the court, and Mr. Justice Story said: "There is no doubt that this steamboat is a common carrier of passengers for hire, and therefore the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question then really resolves itself into the mere consideration whether there was, in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such regulations as the proprietors may prescribe, for the due accommodation of passengers, and for the due arrangement of their business. The proprietors have not only this right, but the further right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of con-

¹ The ferryman has a right to refuse to go until the water falls, and the danger subsides; and the law gives him the right to judge when it is proper for him to cross or not. *Cook v. Gourdin*, 2 Nott & McC. 19.

² Story on Bailm. § 591. *Ansell v. Waterhouse*, 2 Chitt. 1. *Jencks v. Coleman*, 2 Sumn. 221. *Bennett v. Dutton*, 10 N. H. 481. *Markham v.*

Brown, 8 N. H. 523. *Commonwealth v. Power*, 7 Met. 596. The owners of railroads, says Chancellor Walworth, may be prosecuted for damage sustained if they refuse to transport an individual, without any reasonable excuse, upon being paid the usual rate of fare. *Beekman v. Schenectady R.* 3 Paige, Ch. 45. And see *post*, § 609.

³ *Jencks v. Coleman*, 2 Sumn. 221.

ferry company was incorporated with the right to receive such tolls as the mayor and aldermen of a city should determine. The charter was subject to a general law which gave the legislature the right to alter, amend, or repeal charters. After this the legislature passed an act providing that no ferry company should exact of a railway company, whose cars cross a ferry less than one mile in length, any other toll than one cent for each passenger. The act also provided that, so far as it was inconsistent with charters before granted, it should be deemed in alteration thereof. *Held*, that the act was constitutional. *Parker v. Metropolitan R.* 109 Mass. 506.

duct ; or who make disturbances on board ; or whose characters are doubtful or dissolute or suspicious ; and, *à fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board whose object is to interfere with the interest or patronage of the proprietors, so as to make the business less lucrative to them." (a)

§ 526. The proprietors of a stage-coach or of a railroad, who hold themselves out as common carriers of passengers, are of course bound in the same manner to receive all who require a passage, so long as they have room, and they have none of the above-mentioned legal excuses for a refusal. That they run a coach or car in connection with another, which extends the line to a certain place, and have agreed with the proprietor of such other coach or train of cars not to receive passengers who come from that place on certain days, unless they come by his conveyance, is not a legal excuse. The proprietors, by a notice brought home to the individual, have no right to limit their general duty in this manner.¹

§ 527. The case of *Bennett v. Dutton*, in New Hampshire,² showed that the defendant was one of the proprietors and the driver of a stage-coach, running daily between Amherst and Nashua, which connected at the latter place with another coach running between Nashua and Lowell, and thus formed a continuous mail and passenger line from Lowell to Amherst, and onward

¹ *Bennett v. Dutton*, 10 N. H. 481.

² *Ub. sup.*

(a) In *Day v. Owen*, 5 Mich. 520, the right of a carrier by steamboat to exclude colored persons from the cabin was considered. The defendants pleaded a regulation of the boat excluding colored persons from the cabin, and set forth that the plaintiff by his color and race was excluded from ordinary social and familiar intercourse with white persons by the custom of the country, and that his admission into the cabin of the steamboat would have been offensive to the other cabin passengers. On demurrer, the court sustained the defence, and *held* that, "As the duty to carry is imposed by law for the convenience of the community at large, and not of individuals, except so far as they are a component part of the community, the law would defeat its own object if it required the carrier, for the accommodation of particular individuals, to incommode the community at large." So it has been *held* that a regulation of a railroad requiring negroes to sit at one end of a car is valid. *West Chester R. v. Miles*, 55 Penn. State, 209. See *Turner v. North Beach R.* 34 Cal. 594 ; *Pleasants v. North Beach R.* 34 Cal. 586 ; *Tarbell v. Central Pacific R.* 34 Cal. 616. See *post*, § 532.

to Francestown. A third person ran a coach to and from Nashua to Lowell; and the defendant agreed with the proprietor of the coach connecting with his line, that he would not receive passengers who came from Lowell to Nashua in the coach of such third person on the same day that they applied for a passage to places above Nashua. The plaintiff was notified at Lowell of this arrangement, but, notwithstanding, came from Lowell to Nashua in that coach, and then demanded a passage in the defendant's coach to Amherst, tendering the regular fare. It was held, that the defendant was bound to receive the plaintiff as a passenger, there being sufficient room, and no evidence that the plaintiff was an unfit person to be admitted, or that he had any design of injuring the defendant's business.

§ 527 *a*. The place of receiving passengers and the hour of starting, which passenger carriers are bound to observe and conform to, are those which they hold out to the public, and which thus become in the nature of a special contract. Evidence of the usual course of a stage-office, for passengers to call there and register their names in the stage-book, where they are to be called for, is evidence to affect the party with notice.¹ Railway companies are liable to the institution of legal proceedings against them for not running their trains in conformity with their regular official time-tables; the time-tables being of the nature of special contracts, so that any deviation from them renders the company liable.² (*a*)

§ 528. The duty to receive persons as passengers upon a tender of the fare, if there be sufficient room, involves the obligation that

¹ *Whitesell v. Crane*, 8 Watts & S. 369.

² See Boston "Railway Times" of December, 1849.

(*a*) See *Sears v. Eastern R.* 14 Allen, 433; *Denton v. Great Northern R.* 5 Ellis & B. 860; *Hamlin v. Great Northern R.* 1 H. & N. 408; *Hobbs v. London R. L. R.* 10 Q. B. 111; *Le Blanche v. London R.* 1 C. P. D. 286. In *Heirn v. M'Caughan*, 32 Missis. 17, it appeared that a line of steamboats running between New Orleans and Mobile did not ordinarily stop at Pascagoula, but that it was the practice of the company when deemed advisable to give special notice when they intended to stop. The following notice was sent to the postmaster at Pascagoula by the agent of the company at New Orleans: "This is to advise you that the mail-boat hence for Mobile on Saturday next will stop at Pascagoula. You will please have a mail in readiness for Mobile to go by said boat. N. B. Advise all who may feel interested in the above." Held, that the company was bound by the notice.

he shall not be overcrowded after he has paid his fare and taken his seat, and be thereby, as it were, expelled. (a) The contract must be fairly performed. Thus, if coach proprietors take more than the legal number upon the coach, a passenger may refuse to occupy his seat, and sue for expenses incurred, for the contract entered into by them must be performed in terms.¹ (b) And also, if places be taken for several persons to go inside a coach together, it is a breach of the contract if the owner only provides distinct seats for them.² The circumstance, that a passenger is a "steam-boat-man," and, as such, is carried gratuitously, does not deprive him of the right of redress enjoyed by other passengers.³ (c)

¹ Long v. Horne, 1 Car & P. 610.

³ Steamboat New World v. King,

² Ibid.; Deevort v. Loomer, 21 16 How. 469. And see Philadelphia R. v. Derby, 14 How. 468.

(a) See Willis v. Long Island R. 32 Barb. 398, 34 N. Y. 670.

(b) If a passenger car is full, and a person offering himself as a passenger is told that he must ride in the baggage car if he goes on board the train, this is a contract for a conveyance in a particular car, and the carrier is not liable if the passenger is injured while in another car. Galena R. v. Yarwood, 15 Ill. 468. If a person is injured while riding on an engine, the burden is on him to show that the engineer had authority from the company to permit him to ride there. Robertson v. New York R. 22 Barb. 91. For cases where a passenger was injured while riding on the platform of a car, see Willis v. Long Island R. 32 Barb. 398, 34 N. Y. 670; Sheridan v. Brooklyn R. 36 N. Y. 39; Clark v. Eighth Av. R. 32 Barb. 657, 36 N. Y. 135. In Edgerton v. New York R. 35 Barb. 193, the plaintiff paid his fare from New York to Albany, and after travelling a part of the distance left the cars, gave up his ticket and received a check in exchange. In a few days he resumed his journey in a caboose car on a freight train. Passengers were regularly carried in this car, and the conductor received his check in satisfaction of his fare. Held, that he could recover for injuries sustained while on the freight train. See also for a case of injury sustained while riding on a freight train, Chicago R. v. Hazard, 26 Ill. 373. Where a freight car was attached to a passenger train by consent of the agents of a railroad, but contrary to the rules of the company, a person in it was held entitled to recover for an injury. Lackawanna R. v. Chenewith, 52 Penn. State, 382. In Shoemaker v. Kingsbury, 12 Wall. 369, where a passenger on a construction train, run by the contractors building the road, was injured, the contractors were held to be private carriers, and to be responsible only for the exercise of such care and skill in the management and running of their train as prudent and cautious men, experienced in the business, are accustomed to use under similar circumstances.

(c) Todd v. Old Colony R. 3 Allen, 18. Gillenwater v. Madison R. 5 Ind. 837. Wilton v. Middlesex R. 107 Mass. 108. In Packet Co. v. Clough, 20

§ 529. It undoubtedly is one of the qualifications to the obligation of common carriers of passengers, to receive persons as

Wall. 528, a woman was injured in getting aboard a passenger steamer. She was unwilling to pay her fare on account of her injury, and payment was not insisted upon. *Held*, that she did not thereby release her cause of action for the injury, unless at the time she understood that it was to have this effect, and consented. As to how far a person in charge of cattle carried with him under one contract is to be considered as carried gratuitously, see *Smith v. New York R.* 24 N. Y. 222. And in *Bissell v. New York R.* 25 N. Y. 442, where a person in charge of cattle was injured, the court *held* that a common carrier, in consideration of an abatement in whole or in part of his legal fare, may lawfully contract with a passenger that the latter will take upon himself the risk of damages from the negligence of agents and servants, for which the carrier would otherwise be liable. See *Rooth v. North Eastern R. L. R.* 2 Ex. 173; *McCawley v. Furness R. L. R.* 8 Q. B. 57; *Gallin v. London R. L. R.* 10 Q. B. 212; *Hall v. North Eastern R. L. R.* 10 Q. B. 437; *Pennsylvania R. v. Henderson*, 51 Penn. State, 315; *Nolton v. Western R.* 15 N. Y. 444. A carrier may contract with a person carried gratuitously that there shall be no liability for any injury except such as is the result of fraudulent, wilful, or reckless misconduct on the part of the carrier or his servants. *Welles v. New York R.* 26 Barb. 641; *Boswell v. Hudson River R.* 5 Bosw. 699. And the Court of Appeals in New York has gone still further, and now holds that a carrier in such a case may make a contract exempting himself from liability under any circumstances for the negligence of his servants. *Wells v. New York R.* 24 N. Y. 181. See also *Perkins v. New York R.* 24 N. Y. 197; *Smith v. New York R.* 24 N. Y. 222; *Pennsylvania R. v. Henderson*, 51 Penn. State, 315; *Betts v. Farmers' Loan Co.* 21 Wis. 80; *Kinney v. Central R.* 32 N. J. 407; *Pennsylvania R. v. Butler*, 57 Penn. State, 335. In *Railroad Co. v. Lockwood*, 17 Wall. 357, the cases on this subject are elaborately reviewed. A drover was injured while travelling on a stock train from Buffalo to Albany. He had cattle on the train, and had signed a receipt at Buffalo agreeing to take all risk of injury to them and himself, and he received a drover's pass certifying that he had shipped sufficient stock to pass free to Albany, and declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It appeared at the trial that the tariff rates were nearly three times the ordinary rates charged, and that no drover had cattle carried at the tariff rates. The question was whether the railroad was liable for an injury occasioned by the negligence of its servants. The conclusions at which the court arrived are stated as follows: "1. That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law. 2. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. 3. That these rules apply both to carriers of goods and carriers of passengers for hire, and

such, who apply, that they are at liberty to reject applicants whose object in obtaining a passage is to interfere with the proprietors of the conveyance, so as to make their business of transporting passengers less lucrative to them. This was the subject-matter of controversy in *Jencks v. Coleman*,¹ in which it was said by Mr. Justice Story: "Now, what are the circumstances of the present case? Jencks (the plaintiff) was, at the time, the known agent of the Tremont line of stage-coaches. The proprietors of the 'Benjamin Franklin' (the steamboat) had, as he well knew, entered into a contract with the owners of another line (the Citizens' Stage-Coach Company) to bring passengers from Boston to Providence, and to carry passengers from Providence to Boston, in connection with, and to meet the steamboats plying between New York and Providence, and belonging to the proprietors of the 'Franklin.' Such a contract was important, if not indispensable, to secure uniformity, punctuality, and certainty in the carriage of passengers on both routes; and might be material to the interests of the proprietors of those steamboats. Jencks had been in the habit of coming on board these steamboats at Providence, and going therein to Newport; and commonly of coming on board at Newport and going to Providence, avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors. He had the fullest notice that the steamboat proprietors had forbidden any person to come on board for such purposes, as incompatible with their interests. At the time when he came on board, as in the declaration mentioned, there was every reason to presume that he was on board for his ordinary purposes as agent. It has been said, that the proprietors had no right to inquire into his intent or motives. I cannot admit that point. I think that the proprietors had a right to inquire into such intent and motives; and to act upon the reasonable presumptions which arose in regard to them.

¹ 2 Sumn. 221.

with special force to the latter. 4. That a drover travelling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire." The court abstained from expressing an opinion as to the result, if they had considered the drover to be a free passenger.

Suppose a known or suspected thief were to come on board ; would they not have a right to refuse him a passage ? Might they not justly act upon the presumption that his object was unlawful ? Suppose a person were to come on board who was habitually drunk, and gross in his behavior, and obscene in his language, so as to be a public annoyance ; might not the proprietors refuse to allow him a passage ? I think they might, upon the just presumption of what his conduct would be. It has been said by the learned counsel for the plaintiff, that Jencks was going from Providence to Newport, and not coming back ; and that in going down there would, from the very nature of the object, be no solicitation of passengers. That does not necessarily follow ; for he might be engaged in making preliminary engagements for the return of some of them back again. But, supposing there were no such solicitations, actual or intended, I do not think the case is essentially changed. I think that the proprietors of the steamboat were not bound to take a passenger from Providence to Newport, whose object was, as a stationed agent of the Tremont line, thereby to acquire facilities to enable him successfully to interfere with the interests of these proprietors, or to do them an injury in their business. Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry, whose object is to commit a trespass upon his lands ? A case still more strongly in point, and which in my judgment completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast, or dine, or sup at his house ; and an agent is employed by a rival house, at a distance of a few miles, to decoy the passengers away the moment they arrive at the inn ; is the innkeeper bound to entertain and lodge such an agent, and thereby enable him to accomplish the very objects of his mission to the injury or ruin of his own interests ? I think not. It has been also said, that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not to transport them to Boston. Be it so, that they are not absolutely bound. Yet they have a right to make a contract for this latter purpose, if they choose ; and especially, if it will facilitate the transportation of passengers, and increase the patronage of their steamboats. I do not say that they have a right to act oppressively in such cases. But certainly they may in good faith make such contracts to promote their own as

well as the public interests. The only real question, then, in the present case is, whether the conduct of the steamboat proprietors has been reasonable and *bonâ fide*. They have entered into a contract with the Citizens' line of coaches to carry all their passengers to and from Boston. Is this contract reasonable in itself; or is it designed to create an oppressive and mischievous monopoly? There is no pretence to say, that any passenger in the steamboat is bound to go to or from Boston in the Citizens' line. He may act as he pleases. It has been said by the learned counsel for the plaintiff, that free competition is best for the public. But that is not the question here. Men may reasonably differ from each other on that point. Neither is the question here, whether the contract with the Citizens' line was indispensable, or absolutely necessary, in order to insure the carriage of the passengers to and from Boston. But the true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself, and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; otherwise, to be for the plaintiff."

§ 530. Another qualification to which the *primâ facie* duty of the owners of stage-coaches, railroads, and steamboats to receive persons who apply for a passage, on tender of the fare, is their privilege of prescribing all reasonable regulations in respect to the admission of persons into their carriages, depot, &c.¹ Where the entrance of innkeepers, or their servants, into a railroad depot, to solicit passengers to go to their inns, is an annoyance to passengers, or an interruption to the railroad officers in the performance of their duties, the superintendent of the depot may make a regulation to prevent persons from going into the depot for such purpose; and if they, after notice of such regulation, attempt to violate it, and, after notice to leave the depot, refuse to do so, the superintendent and his assistants may forcibly remove them; using no more force than is necessary for that purpose. So, if an innkeeper who has frequently entered a rail-

¹ See opinion of Story, J., in *Jencks v. Coleman*, *ub. sup.*

oad depot, and annoyed passengers by soliciting them to go to is inn, receives notice from the superintendent of the depot hat he must do so no more, and he nevertheless repeatedly nters the depot for the same purpose, and afterwards obtains a icket for a passage in the cars, with the *bond fide* intention of ntering the cars as a passenger, and goes into the depot on his way to the cars, and the superintendent, believing that he had ntered the depot to solicit passengers, orders him to get out, nd he does not exhibit his ticket, nor give notice of his real ntention, but presses forward towards the cars; and the superntendent and his assistants thereupon forcibly remove him from he depot, using no more force than is necessary for that purpose, uch removal is justifiable, and not an indictable assault andattery.¹ (a)

§ 530 a. The propriety and necessity of rules and restrictions s to the entering upon the grounds appropriated to a railroad, nd that authority may be properly exercised by the superin-

¹ Commonwealth v. Power, 7 Met. 96. In the Court of Common Pleas, n Massachusetts (Essex County, 849), an action of trespass was rought against a railroad conductor, or ejecting the plaintiff from the cars f the Boston and Maine Railroad, hich was under the following cirumstances: The plaintiff got into he cars at Lawrence with a ticket or North Andover, and the rule of he railroad was, that passengers nust, immediately after starting, urrender their tickets, or pay their ares if they have no tickets, or be urned out of the cars by the conductor. The plaintiff, when asked or his ticket by the defendant, howed it, but refused to give it up at hat time (alleging that on former ocasions he had been turned out of the ars after giving up his ticket), but romising to give it up when near the nd of the route. There was no stoping place between Lawrence and

North Andover. The conductor then stopped the train, and on the plaintiff's persisting in his refusal, put him out by force. Mellen, J., ruled, that the regulation of the road was reasonable, and that the plaintiff had no right to retain his ticket till he had got near the end of the route, even if he had not previously known of the rule; and that, on his refusal to give it up, the conductor was justified in ejecting him with a reasonable degree of force. The question left to the jury was, whether unnecessary force was used; and the judge observed that the jury on this point would not be nice in scanning the acts of the conductor in the line of his duty, but would make allowance for any little irritation on his part, produced by the conduct of the plaintiff. The verdict was for the defendant. Loring v. Aborn, reported for the Boston Daily Advertiser, of January 3, 1849. (b)

(a) Harris v. Stevens, 31 Vt. 79.

(b) Loring v. Aborn, 4 Cush. 608.

tendent and agents of the company, in enforcing such rules and regulations, having for their object the public convenience, and the quiet and safety of travellers, as recognized in the above case, were adhered to in *Hall v. Power*.¹ Still, the court in this case held the law to be, that the superintendent of a railroad station has not a right to order a person to leave the station and not to come there any more, and to remove him therefrom by force if he does come, merely because such person, in the judgment of the superintendent, and without proof of the fact, had violated the regulations established by the company, or had conducted himself offensively to the superintendent. And, in the trial of an action for assault and battery, brought against such superintendent for expelling the plaintiff from the station, for a supposed violation of one of the company's established regulations, the defendant cannot give evidence of former violations by the plaintiff of other regulations established by the company.

§ 530*b*. Owners of railroads, and also those of steamboats, in respect of the propriety of their making reasonable regulations for the conduct of all persons resorting to them, and to their power to enforce such regulations, are in a condition in some degree similar to that of an innkeeper, whose premises are open to all guests; yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not complying with regulations necessary and proper to secure such quiet and good order.² (a) Where an innkeeper, in a town

¹ *Hall v. Power*, 12 Met. 482.

² Per Shaw, C. J., in *Commonwealth v. Power*, 7 Met. 601.

(a) A regulation made by a railroad company for its benefit may be waived. Thus, where a master took tickets for himself and three servants, keeping the tickets in his own care, but telling the guard that he had the servants' tickets, and the servants were allowed to enter the train without each having or showing his own ticket, it was *held* that the company was estopped from pleading, as a defence to an action by the master against the company for afterwards expelling the servants from the train and refusing to carry them, the by-law: "No passenger will be allowed to enter any carriage or travel therein without

through which lines of stages pass, and at whose inn the stages stop, permits the drivers of some of the lines to resort to his house without objection, he cannot exclude the driver of a rival line from entering the common public rooms where travellers are usually placed for the purpose of soliciting passengers for his coach; provided there is reasonable expectation that passengers are there, and he goes at a suitable time, and conducts with propriety. But this right is forfeited by misconduct. Thus, if affrays occur, or guests are disturbed through his fault, or he is guilty of other abuse, the innkeeper, for the protection of himself, or his guests, may prohibit him from entering until the ground of apprehension be removed; and may treat him as a trespasser if he enters after such prohibition.¹

§ 530 *c.* In an action in the English Exchequer Chamber, against a railway company, for injury to the plaintiff for negligence, the defendants pleaded that the plaintiff was not lawfully in their carriage. The evidence tended to show that the reporters or "Bell's Life in London," of whom the plaintiff was one, when going to races in that capacity, were accustomed to travel free. The plaintiff, acting *bonâ fide* as such reporter, was supplied by ticket which bore the name of a person connected with the paper, but not the plaintiff's, and on it were the words, "not transferable," and a memorandum that any other person using it than the person named in it would be liable to a penalty, as if he was a passenger who had not paid his fare. It was held that there was evidence to go to the jury that the plaintiff was lawfully in the carriage; and that he could not be considered a trespasser; it being explainable by usage.²

¹ Markham v. Brown, 8 N. H. 10 Exch. 376; 26 Eng. L. & Eq. 443. 23.

See *post*, § 609.

² Great Northern R. v. Harrison,

having paid his fare and obtained a ticket, which ticket such passenger is to show when required by the guard, and to deliver up before leaving the company's premises." Jennings v. Great Northern R. Q. B. 1865, 13 Law T. (N. S.) 254. In Maroney v. Old Colony R. 106 Mass. 153, it was held that a rule of a railroad corporation, restricting to special trains the holders of a class of tickets which nevertheless purport to entitle them to passage on any regular train, does not warrant the exclusion from a regular train of the holder of such ticket, he having no notice of the rule.

§ 530 *d*. In some of the States where slavery is permitted, a suspicious, strange negro is deemed by law to be a runaway, and stage proprietors are liable to the master of a slave for taking him as a passenger, knowing him to be a slave, and thus aiding his escape; they are bound to inquire with due diligence into the condition of all colored passengers, and suspicious circumstances, notice, &c., require the utmost diligence. The question came before the Court of Errors and Appeals in Delaware, as to what is a sufficient degree of diligence in such cases. A colored man presented himself in the night at a place where passengers were usually taken up, and, with nothing suspicious about him, demanded a passage. He gave his name and residence, and offered written evidence of his freedom, and was thereupon admitted as a passenger, but was set down, after a short distance, for inability to pay his fare, and before arrival where his papers could be examined. It was held that this did not amount to a want of proper diligence, though the negro should turn out to be a slave.¹ Where the slave of the plaintiff was carried on board a steamboat, and the captain of the boat, on the eve of its departure, being informed of the slave being on board, told the plaintiff's agent to search for her, but made no search for her himself, and the slave was carried off in the boat; the court refused to permit the jury to consider whether the agent of the defendants was guilty of misconduct or negligence in permitting the escape of the slave, and held that it was the duty of the master of the boat to have made such a search as would have prevented an escape, and in not doing so the owners of the boat were responsible.² By the joint effect of the act of the legislature of Kentucky, of 1824 and 1828, the owners, master, and the boat become liable for taking out of the limits of the State any slave who has not in his possession a record of some court of the United States, properly exemplified, proving his right to freedom, unless the owner or master of the boat shall have the permission of the master of the slave for such removal; and not only is the offending party liable in damages to the party aggrieved by such removal, but also to fine and imprisonment; and the boat itself is made liable to the party aggrieved, to be pro-

¹ Redden v. Spruance, 4 Harring. ² Pennsylvania Nav. Co. v. Hundel. 217. As to the carriage of slaves, gerford, 6 Gill & J. 291.
as property, see *ante*, § 122.

needed against by a suit in chancery, and condemned and sold to pay the damages.¹ (a)

3. Their Duty to carry the whole Route.

§ 531. If the usual place of alighting from a stage-coach is at an inn-yard, it has been decided that passengers cannot be compelled to get out even at the inn-gate;² and if the custom is to carry the passengers to their own homes, or lodgings, in a particular place, that must be conformed to.³ *A fortiori*, if the proprietors agree to take a passenger to the place to which they profess their coach or car to go, they cannot refuse to proceed at any intermediate stage; for their undertaking is absolute;⁴ and hence, in case of accident they would be bound to provide another conveyance.⁵ In the State of New York⁶ it was held, that, if a railroad company contract to carry passengers and their baggage beyond the limits of their own road, their duty as carriers extends through the whole route, in respect to which the contract is made. The defendants in this case having undertaken to carry from Saratoga Springs to Albany, were, in the opinion of the court, estopped from saying that their duty as carriers continued no further than Schenectady, the termination of their own road. In order to limit their liability to a part of the route, they should at least have given notice, that, after the car struck the track beyond Schenectady, the traveller must look to another company, if in fact there was another.⁷ But a distinction has expressly been made in Connecticut in this respect, between a carrier of passengers' goods, and a carrier of goods. The latter, we have seen, is *prima facie* bound to carry the goods to the place to which they are directed.⁸ But passengers, say the Supreme Court of Connecticut, take care of themselves. If a passenger is injured upon

¹ *Graham v. Strader*, 5 B. Mon. 73. See *ante*, § 522.

² *Dudley v. Smith*, 1 Camp. 167.

³ Story on Bailm. § 600.

⁴ *Jeremy on Carr.* 23. Story on Bailm. § 600. *Ker v. Mountain*, 1 Esp. 27. *Messiter v. Cooper*, 4 Esp. 30. (b)

⁵ *Jeremy, ub. sup.*

⁶ *Weed v. Saratoga R.* 19 Wend. 534.

⁷ That it is the duty of carriers to carry goods to the place to which they are directed, even if such place be beyond the place to which they usually carry, see *ante*, §§ 95-98.

⁸ See *ante*, § 95.

(a) See *Northern Central R. v. Scholl*, 16 Md. 331.

(b) *Porter v. Steamboat New England*, 17 Mo. 290.

a railroad he knows where the injury happened, and can generally ascertain, without difficulty, what company is in fault, which is not so with the owner of goods which have been damaged along a railroad route, owned by several companies.¹ (a)

§ 532. Although carriers of passengers are not obliged to admit persons who are notoriously and unequivocally bad,² yet, supposing a person to be of infamous character, if he has paid his fare and has been admitted as a passenger, it furnishes no excuse for turning him out so long as he has not been guilty during the

¹ *Hood v. New York R.* 22 Conn. 1, 502. *Elmore v. Naugatuck*, 23 Conn. 457. ² See opinion of Story, J., in *Jencks v. Coleman*, *ub. sup.*

(a) Where several companies appoint an agent with the authority to sell coupon tickets which permit the passenger to pass over the different roads of the several companies, this does not generally make the roads partners. *Straiton v. New York R.* 2 E. D. Smith, 184. *Sprague v. Smith*, 29 Vt. 421. *Ellsworth v. Tartt*, 26 Ala. 733. *Hartan v. Eastern R.* 114 Mass. 44. The circumstances may, however, be such as to constitute them partners. See *Railroad Co. v. Harris*, 12 Wall. 65, 85; *Najac v. Boston R.* 7 Allen, 329; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Carter v. Peck*, 4 Sneed, 203; *Northern Central R. v. Scholl*, 16 Md. 331; *Cary v. Cleveland R.* 29 Barb. 35; *Illinois Central R. v. Copeland*, 24 Ill. 332; *Glasco v. New York R.* 36 Barb. 557; *Williams v. Vanderbilt*, 28 N. Y. 217; *Van Buskirk v. Roberts*, 31 N. Y. 661. Where a contract is made with one railroad to carry a passenger over its own line and also over the road of another company in a car belonging to the first company, and an accident happens owing to a defect in the road-bed of the second company, it has been held that the first company may be sued (*Great Western R. v. Blake*, 7 H. & N. 986; *Buxton v. North Eastern R. L. R.* 3 Q. B. 549), and that the second company is also liable. *Schopman v. Boston R.* 9 Cush. 24. The liability of the first company is, however, denied, where its employees are in no respect to blame. *Sprague v. Smith*, 29 Vt. 421. See *Graham v. North Eastern R.* 18 C. B. (N. S.) 229. It was, however, held liable in *Thomas v. Rhymney R. L. R.* 5 Q. B. 226, *L. R.* 6 Q. B. 266; *John v. Bacon*, *L. R.* 5 C. P. 437. In *Wright v. Midland R. L. R.* 8 Ex. 137, the plaintiff was a passenger on the defendant railway. Another company had statutory authority to run over a portion of the defendant line, paying a certain toll. The signals at the point of junction of the two lines were under the charge of the defendant. Through the negligence of the other company in negligently disobeying a signal, one of its trains ran into the defendant's train and injured the plaintiff. There was no negligence on the part of the defendant company. Held, that it was not liable. In *Railroad Co. v. Barron*, 5 Wall. 90, a railroad company which allowed another company to use its road was held responsible for an accident caused to a passenger, which it itself carried, by the negligence of the other company.

journey of any impropriety of conduct; and none for treating him in so scandalous and disgraceful a manner, and with such insulting language as to compel him to leave the conveyance.¹ (a)

¹ A declaration in assumpsit to carry the plaintiff in a ship to a certain place, alleged as a breach, that the defendants, by their agent, caused him to be disembarked at an intermediate point, and, by their said agent, caused the disembarkation to be conducted in a scandalous, disgraceful, and improper manner, whereby, and also by contemptuous usage and insulting language addressed to the plaintiff by the said agent in effecting said disembarkation, the plaintiff sustained damage. It was *held*, first, that the declaration was good on motion in arrest of judgment; secondly, that the judge at *nisi prius* had rightly received evidence of the language of the captain of the defendant's ship in putting the plaintiff on shore, in which he described the plain-

tiff as being a pickpocket, and belonging to the swell mob; thirdly, that the judge had rightly directed the jury, that the defendants were responsible for any injury naturally resulting from the acts of the captain, when acting as their servant; and that the plaintiff was entitled to fair compensation for the injury done to him in being put on shore at the intermediate place, so far as injury arose from the act of the captain in putting him on shore. *Seem*, also, that supposing the plaintiff had been a pickpocket, or belonged to the swell mob, it would be no excuse for turning him out of a ship in which he had paid his passage, so long as he was not guilty of any impropriety on board. *Coppin v. Braithwaite*, Exch. 1844, 8 Jur. 875.

(a) The conductor of a street-railway car may exclude or expel therefrom a person who by reason of intoxication or otherwise is in such a condition as to render it reasonably certain, that by act or speech he will become offensive or annoying to other passengers therein, although he has not committed any act of offence or annoyance. *Vinton v. Middlesex R.* 11 Allen, 304. *Murphy v. Union Railway*, 118 Mass. 228. See *People v. Caryl*, 3 Parker, C. R. 326. In *Pearson v. Duane*, 4 Wall. 605, a person went on board a steamer at Acapulco, intending to go to San Francisco. After the vessel left Acapulco, the master ascertained that the person had been banished from San Francisco by a vigilance committee, and was threatened with death if he returned. The master, from humane motives, while at sea put the passenger on a return steamer which carried him back to Acapulco. The court was of the opinion that the master would have been justified in refusing the person a passage when he came aboard, if, in the opinion of the master, the circumstances of his banishment would have tended to promote further difficulty, should he be returned to a city where unlawful violence was supreme; but it was *held* that the refusal should have preceded the sailing of the ship, and that it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule in getting on board. It was also said, citing *Coppin v. Braithwaite*, *supra*: "Although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose character is bad, they cannot expel him, after having admitted him as

§ 533. Connected with the duties of public carriers of passengers of receiving persons who offer themselves as such, and of conveying them throughout the entire route they profess to convey them, is the duty of affording, in the progress of the journey, the accommodations they profess to afford. Thus, if there is a general usage to allow certain intervals for refreshment, the carrier cannot, at his pleasure, vary such usage; for it may be that such usage is the very reason for preferring that particular conveyance to the less accommodating arrangement of another line of conveyance.¹ In other words, every passenger is understood to contract for the usual reasonable accommodations.² (a)

4. Their Duty in respect to Land-worthiness.

§ 534. It is laid down, that it is the duty of public carriers of passengers by stage-coaches to provide vehicles reasonably strong,

¹ Jeremy on Carr. 23. And see 5 the same principle, that travellers are Petersdorf, Abr. 48. entitled to the usual reasonable ac-

² Story on Bailm. § 597. It is on commodatioms of an inn.

a passenger and received his fare, unless he misbehaves during the journey." In this case, the court below awarded four thousand dollars damages. This sum the Supreme Court cut down to fifty dollars. We shall see hereafter, § 609, that a passenger who refuses to pay his fare may be ejected from the cars. In Vermont, a statute providing that in certain cases it shall be lawful for the conductor to put the offender off the cars "at any usual stopping place," has been construed to limit and define the right of putting a passenger off the cars. *Stephen v. Smith*, 29 Vt. 160. If a person is wrongfully ejected by a servant of a railroad company, vindictive damages cannot be recovered, unless it is shown that the company expressly or impliedly participated in the tortious act, authorizing it before or approving it after it was committed. *Hagan v. Providence R.* 3 R. I. 88.

(a) If a railroad company gives such published notice of the running of its trains, and such special notice in the cars of the necessity of changing cars at any particular station, that every traveller of ordinary intelligence, by the use of reasonable care and caution, would obtain the necessary information as to the route to be travelled, it discharges its whole duty in this respect. Page v. New York R. 6 Duer, 523. *Barker v. New York R.* 24 N. Y. 599. A railroad company is bound to have the names of the stations announced audibly and to allow passengers time to get off the cars, and, if a passenger is carried beyond his station in consequence of a failure on the part of the railroad so to do, an action will lie. *Southern R. v. Kendrick*, 40 Missis. 574.

with suitable harness, trappings, and equipments.¹ (a) Lord Ellenborough on one occasion said of stage-coaches, that they must be "land-worthy," that he "would at all events expect a clear 'land-worthiness' in the carriage itself to be established."² The question arises then, what is such land-worthiness, or, as it is sometimes denominated, road-worthiness,³ as will answer the duty imposed in this respect by law? In a case in which the declaration stated, that the defendant undertook to carry the plaintiff safely, Mr. Chief Justice Best said: "There is no express undertaking that the coach shall be sound, nor is it necessary; for I consider that every coach proprietor warrants to the public that his stage-coach is equal to the journey it undertakes;"⁴ and hence it becomes the duty of a proprietor of a stage-coach to examine it previous to the commencement of every journey. Indeed, when the vehicle, as is often the case, is crowded with passengers, if no inspection of it takes place immediately previous to each journey, the master of it is guilty of gross negligence.⁵ Such was the case in *Bremner v. Williams*,⁶ which was an action against the proprietor of a stage-coach to recover compensation for an injury sustained by the plaintiff in consequence of the insufficient state of the defendant's coach. It was proved, that the plaintiff and his two sons got into the dickey of the coach for the purpose of being taken to a certain town on the route. After the coach had started, the plaintiff felt a moving of the dickey, and called to the driver and told him of it, and asked him if it was loose. The driver replied, that the motion was produced by the bending of the springs merely, and then drove on; and, soon after, the dickey came off, and the plaintiff fell. On the part of the defendant, the driver was called; who stated, that the coach had come from the coach-maker's, where it had

¹ *Ante*, § 274. 2 Steph. N. P. 983. Story on Bailm. § 592. 2 Kent, Com. 600, 601. *Christie v. Griggs*, 2 Camp. 79. *Camden R. v. Burke*, 13 Wend. 611. *Hollister v. Nowlen*, 19 Wend. 234. *Cole v. Goodwin*, 19 Wend. 251. *McKinney v. Neil*, 1 McLean, C. C. 540. *Peck v. Neil*, 3 McLean, C. C.

22. *Ware v. Gay*, 11 Pick. 106. *Ingalls v. Bills*, 9 Met. 1.

² *Israel v. Clark*, 4 Esp. 259.

³ See *Ingalls v. Bills*, 9 Met. 1.

⁴ *Bremner v. Williams*, 1 Car. & P. 414.

⁵ *Ibid.* *Ware v. Gay*, 11 Pick. 106. *Ingalls v. Bills*, 9 Met. 1.

⁶ *Ub. sup.*

(a) *Farish v. Reigle*, 11 Grat. 697. *Fairchild v. California Stage Co.* 13 Calif. 599.

been under repair, only three or four days before the accident; that it was not a very old coach; and that he and his master examined it on the very morning on which the accident happened. But on his cross-examination, he admitted, that at the time the plaintiff went, the coach was on its second journey, and that no examination had taken place immediately previous to that journey. Mr. Chief Justice Best told the jury, that it was the duty of the proprietor of a stage-coach to examine it previous to the commencement of each journey; and they found for the plaintiff £51 damages.

§ 535. The duty of a coach proprietor most undoubtedly is to make a most careful and thorough examination of his vehicle and equipments immediately previous to each journey, and this is the full extent of his duty, for the warranty on his part implied by law for the sufficiency of his vehicle does not extend to such hidden and external defects as cannot be guarded against by a sound judgment and the most vigilant oversight; which in fact is only saying, that common carriers of passengers are not, like common carriers of goods, insurers.¹ Too much weight, it has been considered, has been given to the comparison of Bosanquet, J., in *Sharp v. Grey*,² viz., that a coach must be road-worthy on the same principle that a ship must be sea-worthy; a comparison which is certainly not correct, unless as applied to the carriage of goods, or baggage.³ (a) In that case the axletree of a coach was broken, and the plaintiff injured. The coach was examined, and no defect was obvious to the sight; but after the accident a defect was found in a portion of the iron bar, which could not be discovered without taking off the woodwork; and it was proved that it was not usual to examine the iron under the woodwork, as it would rather tend to insecurity than safety. It did not appear that the defect could not have been seen on taking off the woodwork; but it would rather seem that it might have been discovered. Park, J., considered it a question of fact entirely; it was clear, he said, that there was a defect in

¹ See *ante*, § 150 *et seq.*

² *Sharp v. Grey*, 9 Bing. 457.

³ See opinion of the court in *Ingalls v. Bills*, 9 Met. 1.

(a) The doctrine of *Sharp v. Grey* has not been followed in England. *Readhead v. Midland R. L. R.* 2 Q. B. 412, affirmed in Ex. Ch. L. R. 4 Q. B. 379.

the axletree; and it was for the jury to say, whether the accident was occasioned by what, in law, is called negligence in the defendant, or not. Tindal, C. J., also puts the case on the ground of negligence and want of proper vigilance, and not on the ground of a warranty of the axletree, like that of a common carrier of goods. In an action by a passenger against the proprietors of a stage-coach in Massachusetts,¹ for an injury occasioned by the insufficiency of the vehicle, the proof was, that the accident was occasioned by the unscrewing and falling off of a nut which secured the right forewheel of the carriage to its axle. It appeared, that while the coach was driven at a moderate rate upon a plain and level road, without coming in contact with any other object, one of the wheels came off, in consequence of the unscrewing of the nut in question; whereby the coach overset, and fell upon and broke the plaintiff's leg. Whether this was owing to the want of duty, or due care on the part of any of the defendants' servants, was left to the jury; the court holding, that the evidence made a *prima facie* case for the plaintiff.

§ 536. The true doctrine upon the subject unquestionably is, that, if there is any defect in the original construction of a stage-coach, as for example, in an axletree, although the defect be out of sight and not discoverable upon a mere ordinary examination, yet if the defect might be discovered by a more minute examination, and any damage is occasioned to a passenger thereby, the coach proprietors are answerable therefor; and the same rule will apply to any other latent defect, which might be discovered by more minute examination, which renders the vehicle not land-worthy, and a damage thereby occurs to any passenger.²(a) The rule in relation to this particular subject, which will probably be always observed as the correct one, is thus very intelligibly expressed by Baron Alderson, in the above-mentioned case of *Sharp v. Grey*,³ in which he says: "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well for such as may exist afterwards, and be discovered on investigation." But that a

¹ *Ware v. Gay*, 11 Pick. 106.

N. P. 983. 2 Stark. Ev. (3d Lond.

² Story on Bailm. § 592. 2 Steph. ed.) 295.

³ *Ante*, § 535.

(a) *Frink v. Potter*, 17 Ill. 406.

coach proprietor is liable for an accident in consequence of a fracture caused by an original internal defect, undiscoverable upon the closest inspection, and unavoidable by human care, skill, and foresight, is a point which has never been sustained by any decision.¹ On the other hand, the Supreme Court of Massachusetts have decided (though contrary to the instructions to the jury, in the court below), that where a passenger in a stage-coach received an injury solely by reason of the breaking of one of the iron axletrees in which there was a very small flaw, entirely surrounded by sound iron one fourth of an inch thick, and which could not be discovered by the most careful examination externally, the proprietor of the coach was not answerable for the injury thus received.² The result at which the court in this case arrived, upon a careful consideration of its circumstances, was as follows: "That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that, if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger, happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment, and the most vigilant oversight, then

¹ 2 Greenl. Ev. § 222. In *Christie v. Griggs*, 2 Camp. 79, the axletree of the coach snapped asunder at a place where there was a slight descent, and the plaintiff was thrown from the top of the coach. Sir James Mansfield, in instructing the jury, said: "As the driver had been cleared of negligence, the question for the jury was as to the sufficiency of the coach. If the axletree was sound, as far as human eye could discover, the defendant was not liable." The undertaking of the proprietor of the coach, as to the pas-

sengers, said the learned judge, "went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore," he continued to say, "if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered." See also *Israel v. Clark*, 4 Esp. 259; *Aston v. Heaven*, 2 Esp. 533; *Crofts v. Waterhouse*, 3 Bing. 321.

² *Ingalls v. Bills*, 9 Met. 1.

the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. And we are of opinion that the instructions which the defendants' counsel requested might be given to the jury in the present case were correct in point of law, and that the learned judge erred in extending the liability of the defendants further than was proposed in the instructions requested." (a)

§ 537. It is also the duty of coach proprietors to guard against a mal-construction of the coach in reference to the position of the baggage. In an action against the proprietor of a stage-coach, employed in carrying passengers from Oxford to Leamington, by the plaintiff, who was thrown from the coach and seriously bruised, it appeared at the trial that the plaintiff took her seat on the back part of the coach, having both her hands occupied so as to prevent her holding by the iron railing on the roof. It appeared further, that there was a considerable quantity of luggage upon the roof of the coach; that there was no iron railing between the luggage and passengers; and that the plaintiff, being so seated on the back of the coach, with her back to the gage, was, by a sudden jerk, thrown from the coach in a street in Oxford, and had her leg broken. Several witnesses proved that the plaintiff had repeatedly said the accident was not owing to any fault of the coachman, but to the fact of having her hands so full, so as to prevent her holding by the railing when the jolt took place. The learned judge (Lyndhurst, C. B.) directed the jury to find for the plaintiff, if they were of opinion that the injury sustained was occasioned by the negligence of the defendant or his servant. The jury found for the plaintiff; and they stated that they so found, on account of the improper construction of the coach, and of the luggage being on the seat. On motion for a new trial, Lord Tenterden, C. J., said: "I think the direction of the learned judge was perfectly right; for the mal-construction of the coach, or improper position of the luggage, would be negligence in the defendant or his servants."¹ (b)

¹ *Curtis v. Drinkwater*, 2 B. & Ad. 169.

(a) See *post*, § 538, n.

(b) *Farish v. Reigle*, 11 Grat. 697. If an agent of a stage line requests a passenger to take an inside seat, and informs him that if he remains outside

§ 537 *a*. Ferryman, whose business it is to convey passengers by land across a river, are subject to the same rules in regard to negligence, and they become liable whenever an injury to a passenger can be traced to the slightest neglect on their part. A ferryman cannot escape liability for an injury to a passenger occasioned by the narrowness or shortness of the boat, the want of proper railing, or any like deficiency. His duty is, moreover, to have the landing in a complete state of repair for the reception of travellers, and to furnish proper easements for entering the boat, and to provide fastenings to keep the boat in a firm and steady position while passengers are being received.¹ (*a*)

§ 538. There is as much, if not more, reason why the rules of the common law above laid down as applicable to stage-coaches should be applicable to the modern mode of conveyance by railroads;² as they take the place of other modes of conveyance in the carrying of passengers.³ When the carriage is by railroad,

¹ *Cohen v. Hume*, 1 McCord, 439. A ferryman, as commander of his vessel, and the keeper of the ferry, by public authority, as well as from the liability which attaches for injuries, is to have the sole and entire direction and management of the boat; he may, or may not, at his election and pleasure, constitute passengers his agents. They are to be so considered in every instance where they act discreetly and in subservience to his orders; but where, in violation of his authority and directions, should a loss happen from such cause, he is not liable. *Ibid.* See *ante*, §§ 82, 165.

² See *ante*, § 78.

³ *Commonwealth v. Power*, 7 Met. 596. *Eldridge v. Long Island R.* 1 Sandf. 89. *Beers v. Housatonic R.* 19 Conn. 566. In England, provisions are made by the legislature for the punishment of offences committed on

a railway and works connected therewith, and calculated to compromise the safety of the traffic on the line of railway, or otherwise to interfere with the due conduct of the company's business. There are two cases provided for: 1st, offences committed by persons employed upon the railway; and 2dly, those committed by persons in general. 1st. An officer or agent of any railway company, or any special constable duly appointed, and all such persons as they may call to their assistance, may seize and detain any engine driver, guard, porter, or other servant in the employ of such company, who shall be found drunk while employed on the railway, or who shall commit any offence against any of the by-laws, rules, or regulations of such company, or shall wilfully, maliciously, or negligently do or omit to do any act whereby the life or limb of any person passing along, or being

he does so at his peril, this does not prevent the passenger from recovering if he is injured by want of ordinary care on the part of the driver. *Keith v. Pinkham*, 43 Me. 501.

(*a*) See *Joy v. Winnisimmet Co.* 114 Mass. 63.

the railroad company impliedly warrants the road itself to be in good travelling order, (a) and fit for use, and impliedly prom-

upon the railway belonging to such company, or the works thereof respectively, shall be or might be injured or endangered, or whereby the passage of the engines, carriages, or trains shall be or might be obstructed or impeded, and convey the party so offending, or any counselling, aiding, or assisting in such offence, with all convenient despatch, before some justice of the peace for the place, &c. If convicted, the offender may be imprisoned, with or without hard labor, for a period not exceeding two months, or fined a sum not exceeding £10, and, in default of payment, may be imprisoned for the above period, or until he pays the fine. 3 & 4 Vict. c. 97, § 13. The justice, instead of deciding summarily, may send the case to the quarter sessions, and in the mean time either commit the party to prison, or take bail for his appearance, with or without sureties; if convicted at the quarter sessions, he may be imprisoned, with or without hard labor, for any period not exceeding two years. The above provision for the punishment of the servants of railway companies is now extended and made to embrace not merely servants, &c., of the company, but likewise all persons employed either by the com-

pany or any other person, &c., in conducting traffic upon the railway, or in repairing and maintaining the works of the railway. 5 & 6 Vict. c. 55, § 17. 2dly. Of offences committed by persons in general to the obstruction of the traffic on the railway, trespasses, &c. Every person who shall wilfully (3 & 4 Vict. c. 97, § 15) do or cause to be done any thing in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same, or shall aid or assist therein, is guilty of a misdemeanor, and being convicted thereof, may be imprisoned, with or without hard labor, for any time not exceeding two years. And any person who wilfully obstructs, &c., any officer, &c., of the company in the execution of his duty upon the railway, &c., and refuses to depart upon being requested, so to do by any officer, &c., of the company, as also any one aiding, &c., therein, may be apprehended and taken before a justice of the peace, &c., and fined any sum not exceeding five pounds, and, in default of payment, may be committed for any term not exceeding two calendar months, or until he pays the fine.

(a) In *Great Western R. v. Braid*, 1 Moore, P. C. (N. S.) 101, the question of the amount of care required to guard against accidents to the road-bed of a railroad was much considered; and it was *held* that a railroad company should construct its works in such a manner as to be capable of resisting all the violence of the weather which might be expected, though perhaps rarely, to occur, in the place where the railroad is situated. See also *Withers v. North Kent R.* 3 H. & N. (Am. ed.) 969; *Ruck v. Williams*, 3 H. & N. 308; *Matteson v. New York R.* 35 N. Y. 487. In *Deyo v. New York R.* 34 N. Y. 9, an accident on a railroad was caused by some person maliciously removing the spikes from the chair of the rail. *Held*, that there being no proof of negligence on the part of the defendant company, it was not liable. See *Schopman v. Boston R.* 9 Cush. 24. It is clearly the duty of railroads to have their landings and places of receiving passengers so constructed that persons going

ises all persons who agree to become passengers to provide road-worthy engines and carriages,¹(a) with suitable equip-

¹ *Carpue v. London R.* 5 Q. B. 4 M. & W. 749. *Bridge v. Grand 747. Palmer v. Grand Junction R.* Junction R. 3 M. & W. 244.

to and from the cars as passengers may pass with safety, but if a person intends to go in a freight train, the road not being a common carrier of passengers in its freight trains, he is entitled only to such accommodations as such trains usually have, and there is no obligation on the railroad to provide safe landing-places or means of getting into the train other than such as are usually there. *Murch v. Concord R.* 9 Foster, 9. See *ante*, § 521, n. If a collision takes place in consequence of a train running several hours out of time, the company is liable, such an act being gross negligence. *Chicago R. v. George*, 19 Ill. 510. In *Tyrrell v. Eastern R.* 111 Mass. 546, a gate at a railway crossing was struck by a runaway horse, and caused to swing across the track as a passenger train approached. One end of it entered a car and injured a passenger. *Held*, that if it was so constructed or arranged that, in any event which might reasonably be expected to occur, it was dangerous to passengers, the road was liable, and that this was a question for the jury.

(a) The statement of the text that there is an implied warranty on the part of a railroad company is incorrect, and the cases cited do not support the proposition. The question is whether the company has been guilty of negligence. And the rules stated *ante*, § 536, apply. *Warren v. Fitchburg R.* 8 Allen, 227. *Hegeman v. Western R.* 3 Kern. 9; 16 Barb. 353. The accident in this case was caused by a defective axle. The jury was instructed, "that although the defendant purchased his axles and cars of extensive and skilful manufacturers, who in the exercise of their skill knew of no test and used no test to discover latent defects in axles, yet if there were any tests known to others, and which should have been known and employed by the manufacturers as men professing skill in their particular business, although the same may not have been used by some others engaged in the same business, the defendant was guilty of negligence in not using this test, provided the injury occurred to the plaintiff by reason of a defect, which by such test might have been discovered." The instruction was *held* to be correct, the court saying: "The substance of the charge was, that, although the defect was latent, and could not be discovered by the most vigilant external examination, yet, if it could be ascertained by a known test, applied either by the manufacturer or the defendant, the latter was responsible." See *Manser v. Eastern Counties R.* 6 H. & N. (Am. ed.) 899; *Readhead v. Midland R. L. R.* 2 Q. B. 412, L. R. 4 Q. B. 379; *Richardson v. Great Eastern R.* 1 C. P. D. 342, overruling *S. C. L. R.* 10 C. P. 486. It is, however, now held in New York, that the obligation to provide road-worthy vehicles is absolute, and irrespective of the question of negligence. *Alden v. New York R.* 26 N. Y. 102. Where the distance between a car and a bridge was so small as to endanger projecting limbs, it was *held* that the car was not road-worthy if the windows were not so constructed as to prevent the passengers from putting their arms through them. New Jer-

its, and to place each carriage on a proper position in the train.¹ It appears that a passenger in the cars upon the road of the New York and Erie Railroad Company has recently received a verdict of \$8,000 as compensation for severe injuries sustained by him four years before, maiming him for life, by an accident to the train in which he was. The accident was caused by a defect in one of the wheels, which broke, and in consequence thereof the cars were thrown into a gully.² Accidents of this kind and have, in our country, occurred by reason of bridges improperly constructed for the passage of the carriages of railroads. In England, in an action brought against a railway company for compensation for injury received by the plaintiff by the breaking down of a bridge over which he was passing in a passenger-train, it was held to be a proper question for the jury, whether the defendants had engaged the services of a competent engineer, who

was ruled by Lord Denman, C. J., in *Ker v. South Western R.*, at Kings-spring Assizes, 1843, Walf. Sum. Law of Railroads, 304. So held, in *Nashville R. v. Messino*, 1 Sneed,

And see *post*, § 541; *Baltimore & Annapolis R. v. Woodruff*, 4 Md. 257; *Dakin v. New York & N. H. R.*, 8 C. B. 92.

Oliver v. New York R. reported in the "New York Express" for

October, 1848, as having that week been decided in the Circuit Court of New York, held at Newburgh. The case was to be carried up; but it was understood that the company, before the suit was brought, offered a liberal compromise; but as they regarded the claim made by the plaintiff as one of extortion, they resisted payment.

See v. Kennard, 21 Penn. State, 203. Where an injury was occasioned by displacement of a switch, it was held to be the duty of the railroad company to see that the rails were in the right position, and not to trust exclusively to the lever of the switch being right, when the rails were in open view. *See v. Rochester R.* 20 Barb. 282. In *Sullivan v. Philadelphia R.* 30 Penn. St., 234, it was held that although, as between the railroad and the owner of the land, the railroad was not obliged to fence its road, yet that it was liable to a passenger who was injured by the train running over a cow. And in *see v. Kennard* it has been held that a statute requiring a road to fence is for the benefit of the adjoining lands and not of the passengers, and that where a passenger was injured by the train running over a bullock, the question for the jury was whether the defendant had been guilty of a breach of duty towards their passengers, that duty being to take all due care to prevent accidents. *Buxton v. North Eastern R. L. R.* 3 Q. B. 549. See *Nashville R. v. Messino*, 1 Sneed, 220; *Brown v. New York R.* 34 N. Y. 404. In *Clark v. New York & N. H. R.* 32 Barb. 657, a ruling that a horse-railroad corporation was bound to exercise great care and caution was held to be correct. See *S. C.* Y. 135.

had adopted the best method, and had used the best materials, and that if the defendants had done so they would not be liable; but that the mere fact of their having engaged the services of such a person would not relieve them from the consequences of an accident arising from a deficiency in the work.¹ (a)

§ 539. The principle which renders it obligatory upon carriers by land to provide against an improper position of baggage, renders it obligatory upon the owners of water-craft so to construct, arrange, and secure the implements and machinery on board for the management of their vessel, in such a manner as not to expose to injury the persons of passengers on board, by wounding, &c. Where the plaintiff, a passenger in a steamboat from Hartford to New York, in an action against the owners for injuries sustained by him through the negligence of the master, having proved that, on the arrival of the boat at the dock in New York, the chain-box used to keep the boat in trim was so insufficiently secured that it rolled across the deck, and striking against the plaintiff threw him overboard, whereby one of his legs was broken, and his body bruised, offered further evidence to prove, that after he was taken from the water, and while sitting upon the wharf, he applied to the master for some of his men to assist him into a

¹ *Grote v. Chester R.* 2 Exch. 251. And see *Sharp v. Grey*, 9 Bing. 459, and *ante*, § 536.

(a) *Hegeman v. Western R.* 3 Kern. 9, 16 Barb. 353, establishes the rule in regard to the duty of a railroad to avail itself of new inventions tending to produce greater security to passengers. It was *held* to be a question for the jury whether the railroad was or was not negligent in not using a safety beam, taking into consideration the vigilance required of carriers of passengers, the publicity of the invention, and its use prior to and at the time of the injury; and it was *held* to be no excuse that it was not in use by the New England railroads or by any other particular roads. See also *Le Barron v. East Boston Ferry*, 11 Allen, 312; *Smith v. New York R.* 19 N. Y. 127. If a statute creates a duty on the part of a carrier, with the object of preventing a mischief of a particular kind, a person who, by reason of the carrier's neglect of the statutory duty, suffers a loss of a different kind, is not therefore entitled to maintain an action for such loss. Thus where a statute provided that cattle should be carried in a certain manner, and the object was to prevent contagious diseases, a declaration, setting forth that by reason of such neglect certain sheep were washed overboard from a ship and lost, is bad on demurrer. *Gorris v. Scott*, L. R. 9 Ex. 125. Neglect, however, to observe the statute is evidence of negligence. Per Pollock, B., in *Gorris v. Scott*. See also *Blamires v. Lancashire R.* L. R. 8 Ex. 283; *Williams v. Great Western R.* L. R. 9 Ex. 157.

age, who refused, saying that he had enough for his men to a board ; it was held, that such evidence was admissible, first, use the duty and conduct of the master were involved in the action in question, and the evidence was a part of the *res* ;¹ and secondly, because the evidence was proper for the use of showing the damage sustained. As to the duty of theendants to do something more than merely to place the plainon the wharf, and there abandon him, without the power ofoving himself, the court remarked: "Whether, under such instances, the law does not require them to go further, and what is reasonable and necessary to place him in a situation re he might be taken care of, we do not think it necessary to rmine. One thing, however, is certain ; if the law does not ire it, humanity does ; and before we could sanction as law ctine so contrary to the dictates of humanity, we should ree satisfactory reasons in support of it."²

Their Duties in respect to the Character and Competency of their Servants.

540. The general rule as to all persons professing to rise any trade or employment for all persons indifferently, hat they are bound for a due application, on the part of r servants, of the necessary attention, art, and skill.³ Skill, he driver of a stage-coach, or as the engineer, or switch-ler on a railroad, may often be the gist of an action by a senger for the recovery of damages for injuries received from dents.⁴ Persons so employed are voluntary agents, and profess ave skill in their employment ; and they are employed in busi- which demands both a high degree of skill and of firmness. y must be such as are, in the first place, fully competent, and he next, careful and trustworthy in their general character. ompliance with the provisions of the Revised Statutes of Mas-achusetts (c. 3, §§ 78, 79), respecting the putting up of notices of

See *ante*, § 468.

Hall v. Connecticut River Steam-
Co. 13 Conn. 319.

Physicians, surgeons, and law-
, as well as smiths and farriers,
rever they engage their services
hire, are responsible for the skill
art necessary to accomplish safely

what they undertake, in so far as
ordinary skill and art can accomplish
it. See *ante*, § 434.

⁴ A railroad company is bound to
the most exact diligence in the man-
agement of a switch. *McElroy v.*
Nashua R. 4 Cush. 400.

railroad crossings, and of the ringing of a bell when the engines are passing over the same, will not exempt the proprietors of a railroad from their obligation to use reasonable care and diligence in other respects when running their engines over crossings, if the circumstances of the case render the use of other precautions reasonable.¹ (a) Upon this subject there is a perfect correspondence between the American and the English law.² The first may be considered to have been stated by the court to the jury in *Peck v. Neil*,³ in which the jury were told, that every person who establishes a line for the conveyance of passengers, and who holds out inducements to persons to travel in his vehicles, for which a compensation is charged, is bound to have skilful and prudent drivers; and that the utmost skill and prudence of the driver must be exercised to avoid accidents. The English doctrine on the subject is laid down by Mr. Chief Justice Best, in reference to stage-coaches, but in its reasoning it will equally apply to railroads. "The coachman," says this learned judge, "must have competent skill, and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens."⁴ (b)

¹ *Bradley v. Boston & Maine R. 2 Cush. 539.* *Galena R. v. Loomis*, 13 Ill. 548.

² *McKinney v. Neil*, 1 McLean, C. C. 540. *Farwell v. Boston R. 4 Met. 49.* *Carpue v. London R. 5 Q. B. 747.* See also *McLane v. Sharpe*, 2 Harring. Del. 481.

³ *Peck v. Neil*, 3 McLean, C. C. 22.

⁴ *Crofts v. Waterhouse*, 3 Bing. 321. It has been very properly suggested, that railroad engineers should pass examination and be licensed as such, before they should have the charge of a passenger train at least;

or two classes might be licensed; the first for passenger trains, the second for freight trains. It is too often the case, that engineers run trains who are incompetent to their duty, because they will work for less than a properly qualified class. But what is termed economy is too much the order of the day, and is but a spurious economy; and the practice of this doubtful virtue is the cause of many collisions of trains, of running off the track, and of running down travellers at points where the iron road crosses the public highway, upon which no man has any right

(a) "Compliance with positive statute regulations does not exempt the carrier from responsibility for neglect to observe all other reasonable precautions." *Gray, J., in Simmons v. New Bedford Steamboat Co.* 97 Mass. 368.

(b) *Tuller v. Talbot*, 23 Ill. 357.

§ 541. It is very obviously the duty of the proprietors of all public lines of conveyance not to employ as their servants persons of intemperate habits, and who are liable to be intoxicated while in the performance of the journey;¹ (a) and who thus become liable to fail in the exercise of that sound and reasonable discretion necessary to avoid dangers and difficulties; for if the driver of a stage-coach, or the engineer on a railroad, is under any circumstances guilty of misconduct, rashness, or negligence, the proprietors will be responsible for any injury resulting therefrom.² Thus, if a coachman drives with reins so loose that he cannot manage his horses, the proprietors will be answerable;³ and so, if, in passing through any place that is dangerous, he does not inform the passengers of the full extent of the danger.⁴ If the driver, when any danger occurs, does not take the safest course, the proprietor is responsible for the mischief which ensues.⁵ When no obstruction exists, the driver is not justified in deviating from the accustomed road. Thus, where a coach was upset in consequence of such deviation, and an action was brought for a consequent injury, the judge told the jury, that, as there was no obstruction in the road, the driver ought to have been kept within the limits of it; and the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict; and a verdict having been returned accordingly, the court granted a new trial on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence.⁶ On

to jeopardize another person's life or property, who is peaceably enjoying his or her privilege of riding or walking along, by night or by day. See an article entitled "Accidents on Railroads," in the "Boston Daily Bee" of December 29, 1848.

¹ *Stokes v. Saltonstall*, 13 Pet. 181. *Wynn v. Allard*, 5 Watts & S. 544. *Stockton v. Prey*, 4 Gill, 406. And see *McKinney v. Neil*, 1 McLean, C. C. 540; and *post*, §§ 547, 565.

² 2 Kent, Com. 601, 602. Story on Bailm. § 598. *Stokes v. Saltonstall*, *ub. sup.* *Peck v. Neil*, 3 McLean, C. C. 22. *McKinney v. Neil*,

1 McLean, C. C. 540. *Skinner v. London R.* 5 Exch. 787; 2 Eng. L. & Eq. 360.

³ *Aston v. Heaven*, 2 Esp. 533. And see also *McKinney v. Neil*, 1 McLean, C. C. 540; *Cotterill v. Starkey*, 8 Car. & P. 691.

⁴ *Dudley v. Smith*, 1 Camp. 167.

⁵ *Jackson v. Tollett*, 2 Stark. 37. *Mahew v. Boyce*, 1 Stark. 423.

⁶ *Crofts v. Waterhouse*, 3 Bing. 319. If the driver leaves the common track and takes one not used, which increases the risk, it is evidence of negligence. *McKinney v. Neil*, 1 McLean, C. C. 540.

(a) *Frink v. Coe*, 4 Greene, Iowa, 555.

the same principle, if the driver of a railroad engine, by negligence or unskilfulness causes the train to be thrown off the rails, the railroad company is responsible for all damages and injuries that may be sustained by the passengers in consequence.¹ Misconduct on the part of the driver of a stage-coach may consist in overlading the coach with baggage, and in not taking care to adjust the weight of it, so that the coach is not made top-heavy, and so not liable to upset.²

§ 542. In an action on the case for negligence and misconduct on the part of the driver, the declaration stated, that the plaintiff "had agreed to become a passenger" by the defendant's omnibus, and that the defendant "received the plaintiff as such passenger." Plea, that the plaintiff did not become a passenger, and that the defendant did not receive him as such. It appeared that the plaintiff held up his finger to the driver of the omnibus, who stopped to take him up, and just as the plaintiff was putting his foot on the step of the omnibus the driver drove on, and the plaintiff fell on his face on the ground. It was held, that this was evidence to go to the jury in support of the declaration; as the stopping of the omnibus implied a consent on the part of the driver to take the plaintiff as a passenger.³

6. Their Duties in the Progress of the Journey in respect to Rate of Speed.

§ 543. The duties of the driver of a stage-coach in driving on the road are very important, and, if any injury occurs to a passenger in consequence of furious driving, the proprietor will be responsible.⁴ If one of the linchpins come out, and the wheel by which it was secured comes off, and the jury are of opinion that the accident proceeded from such rate of driving, the proprietor is responsible for all injury thereby done to the passengers.⁵

§ 544. There has been a case in this country which authorized very exemplary damages by the jury to a stage-coach passenger, for injuries which he received in consequence of the rash and

¹ *Carpue v. London R.* 5 Q. B. 747. *Beers v. Housatonic R.* 19 Conn. 566. *Farwell v. Boston R.* 4 Met. 49.

² *Long v. Horne*, 1 Car. & P. 612. *Israel v. Clark*, 4 Esp. 259. *Aston v. Heaven*, 2 Esp. 533. *Heard v. Moun-*

tain, K. B. 1826, cited in 5 Petersdorf, Abr. 54.

³ *Brien v. Bennett*, 8 Car. & P. 724.

⁴ *Stokes v. Saltonstall*, 13 Pet. 181.

Gough v. Bryan, 5 Dowl. P. C. 765.

⁵ *Mayor v. Humphries*, 1 Car. & P. 251.

ous driving of the coachman. In *McKinney v. Neil*,¹ it appeared that the defendant was an extensive stage proprietor, and the lines of stages from Columbus to Zanesville, in Ohio; that the plaintiff, being in Columbus, took a seat for the morning's stage to Zanesville. It was observed on the part, by the passengers, that the driver drove very fast; and it appeared that after a short delay at Jack-Town, the driver continued on his route at the same rapid rate. The driver passed the right-hand side of a two-horse wagon of a Mr. Hill, a witness, who was driving in the same direction as the stage; and, hearing the stage, turned his horses to the left, which gave the stage more than half the road. The stage passed without coming in contact with the wagon, and the witness observed that the horses except one, which was a very fast trotter, were in full gallop. The stage had a patent lock or rubber, but the driver, instead of using the lock to retard the progress of the stage, in descending a hill, applied the whip twice within the observation of the witness; and the hill was between a quarter and a half a mile long. After passing the wagon, the horses ran to the verge of the right-hand side of the road, and then inclined to the left. The plaintiff and another passenger on the outside remonstrated with the driver more than once, and requested him to use the lock; but he refused to do so, saying to them there was no danger. The horses continued their direct course to the left until the rear wheels of the stage ran off the paved road a foot or two, and continued so to run some two or three rods, when the horses turned to the right, and the stage upset with great violence. The ground where this occurred was nearly level. The off-wheels ran on the paved road, but the descent was small from the paved to the unpaved part of the road; and, with ordinary good driving the coach could have been in no danger of upsetting. It, however, did upset, and at the time of the accident the speed of the horses was about as fast as it had been. The consequence was, that the plaintiff was picked up shockingly and dangerously mangled; and so serious were the injuries he received, that there was little chance that he would ever entirely recover from them. The court, in charge to the jury, told them that "the driver must not be skilful, but he is bound to exercise the utmost degree of

¹ *McKinney v. Neil*, 1 McLean, C. C. 540.

care; and if they should think, from the evidence, that, in commencing the descent of the hill and driving down it, in the manner proved, he acted imprudently or rashly; the defendant was liable; although they should find that the immediate cause of the upset was the breaking of the lines. The least degree," said the court, "of imprudence or want of care in the driver fixed the liability of his employers; and if, in the present case, in descending the hill, such an impetus was given to the coach as to render it difficult and hazardous for the driver to check and control his team, the defendant was liable." The jury returned a verdict of five thousand and three hundred and twenty-five dollars in damages.

§ 545. *A fortiori* the proprietors of a stage-coach will be responsible for the consequences to a passenger of an accident occasioned by the racing of his driver against other coaches; and it is the duty of a driver not to drive unbroken and vicious horses, and not to excite such horses as are broke and not naturally vicious, to such a rate of speed, that they cannot be stopped, or properly directed.¹ In all cases of collision in a public road, if the jury believe that a driver of a vehicle was engaged at the time in a trial of speed, the jury may give very exemplary damages.² In the Circuit Court of the United States, for the Seventh Circuit, in the year 1840, an action was brought for an injury done to the plaintiff's wife, by the overturning of the stage through the carelessness of the driver, the defendant being the proprietor. It appeared that there were two stage lines on the route between Marietta and Zanesville, Ohio, and that one carried the mail. Neil's line was run in opposition to the mail line, and Peck and his wife took the former at Zanesville for Marietta. The stages left Zanesville at about the same hour. The accommodation sometimes passed the mail stage whilst detained at a post-office. The horses in both lines were driven rapidly, often at their full speed, against the remon-

¹ Per Best, C. J., in his charge to the Wilts grand jury, cited in note to 8 Car. & P. 694. See also *Monroe v. Leach*, 7 Met. 274; *Churchill v. Rosebeck*, 15 Conn. 359. Though a party should lose all control of his horse, in driving, in a public road, and an injury ensues in consequence, yet if

the loss of control was the result of the defendant's prior faults, the plaintiff may recover. *Kennedy v. Way*, *ub. sup.* *Claffin v. Wilcox*, 18 Vt. 605.

² *Kennedy v. Way*, Brightly, N. P. 186.

nance of the passengers in Neil's accommodation line. When in about six miles of Marietta, the mail stage overtook the other about a quarter of a mile before they reached a hill; the driver of the mail coach requesting the other driver to give half the road and he would pass him. The driver answered, that he was not so anxious for a race as that. The mail driver then turned his horses to the right, whipped them and hallooed, and then started the horses in the other stage, which had been moving along slowly. The horses in the accommodation stage did not stop fast, but jumped; the driver struck the off-wheel horse, in the rear, as he alleged, to bring him nearer the tongue, and give him the road to the other stage. The driver pressed the lever,

Donaldson, who sat with him, raised the reins, and, with the other lever, pulled them. The other coach inclined to the left, until the fore-wheel of the mail coach locked in the fore-wheel of the other coach, broke its double-tree, and threw the stage and horses over the precipice, whereby the plaintiff's wife, Mrs. Peck, was severely injured. Several physicians stated, that her health by this injury had been permanently impaired, her arm disabled, and it was the opinion of some that the injury she received would probably shorten her life. There was evidence conducing to show a concerted arrangement between the two drivers in regard to racing, and it was fully proved, that the horses in both stages were driven over a greater part of the route in a most rapid and reckless manner, against the remonstrance of the plaintiff Peck. On the evidence, the court charged the jury, that, to exonerate the defendant from liability, he must show that every precaution was used by his agent to prevent the injury which occurred; that every omission of duty by the driver, which in any degree increased the risk of the passengers, subjected the defendant to damages for an injury done them; that although the upsetting of the coach may have been caused immediately by the driver of the mail coach, for which he and his employers were liable to damages, still if Neil's driver, under the circumstances, did not use all the means which a skilful and prudent driver could and should have used to prevent the injury done, the defendant was liable. The jury returned a verdict for the plaintiff, and assessed damages at five thousand dollars.¹

¹ *Peck v. Neil*, 3 McLean, C. C. 22.

§ 546. It of course follows, that driving so rapidly over a railroad by the servants of the company as to amount to rashness is equally inexcusable; and the fact of rashness will depend much upon the condition of the road. What would not be an improper rate of speed over one portion of the rails might be in another, as for instance, where the rails are sprung, the sleepers broken, or the bridges not road-worthy. Evidence may unquestionably be given, that an injury was received by a passenger in consequence of the improper speed with which cars on a railroad were drawn over a spot which presents the obstructions and defects like those just mentioned.¹ (a) In short, when the carriage is by railroad, the railroad company impliedly warrants the road to be in good travelling order and fit for use. Then again, supposing the condition of the road itself to be ever so good, the conductor of the train is guilty of misconduct, by endeavoring to drive his train to a certain station before it is reached by a counter train; for if the conductors of both trains are governed by the same idea, the passengers are exposed to the dangers of a collision.

§ 547. The liability of the passenger carrier, for a neglect of duty in respect to rapid and furious driving, will be the same, although the injury resulting to the passenger therefrom is occasioned by his own act, as by leaping from the vehicle, when the state of peril will justify it. Such an act the law deems a natural and prudent precaution to extricate a person from peril, for which the proprietor of the line would have been liable. The case of *Jones v. Boyce*,² (b) was an instance of this sort, although the coach in which the plaintiff was a passenger was not actually overturned. In the before-mentioned case of *McKinney v. Neil*,³ in which it appeared that the plaintiff recovered heavy damages, where the coach, on the roof of which he was travelling, was upset by the recklessness of the driver in fast driving; it was evident, from the manner of the injury, that the

¹ *Carpue v. Brighton R.* 5 Q. B. 747. And see *Farwell v. Boston R.* 4 Met. 49.

² *Jones v. Boyce*, 1 Stark. 493.

³ *McKinney v. Niel*, 1 McLean, C. C. 540; and *ante*, § 544.

(a) See *Wilds v. Hudson River R.* 29 N. Y. 315; *Brown v. New York R.* 34 N. Y. 404; *Telfer v. Northern R.* 1 Vroom, 188.

(b) See *Wilson v. Newport Dock Co.* L. R. 1 Ex. 187.

ntiff attempted to jump from the coach, and that the top of must have fallen upon him. In *Stokes v. Saltonstall*, in the Supreme Court of the United States,¹ which was an action for damages against the owners of a line of stage-coaches from Baltimore to Wheeling, it appeared that the defendant in error, with wife, had been passengers in one of the coaches which was upset, by reason of which the wife had several bones in her body broken, and was otherwise greatly injured. It was proved, that, the last change of horses before the accident, the passengers generally remarked that the driver seemed to have drunk too much to go on. When the coach arrived at a certain part of the route, the passengers felt the coach strike against a mound or ridge on the right side of the road. The husband, on perceiving this, immediately jumped out, as was believed with the intention of stopping the horses; his wife attempted to follow, but fell to the ground at the instant the coach upset, and it fell directly on her; and this was in the afternoon in broad daylight; and she was thereby injured in the manner above mentioned. The injury was occasioned by the falling of the coach on her body. The driver was not considered dangerous or difficult. The driver was believed to be intoxicated, and his intoxication believed to be increased by his drinking with a man on the seat alongside of him; which belief was produced by a recklessness and irregularity in driving, which called for repeated remonstrances from the passengers. He appeared unfit for any thing, would answer no question, nor afford the least assistance. The husband, it was held, was entitled to recover, and he and his wife, it was also held, had reasonable ground for supposing that the coach would be upset; although the jury might believe, from the position in which the coach was placed by the negligence of the driver, the attempt of the husband and his wife to escape may have increased the peril, or even caused the coach to upset. (a) The same doctrine applies equally to railroad carriages as to stage-coaches.² (b)

Stokes v. Saltonstall, 13 Pet. 181.

² *Eldridge v. Long Island R. 1*
Sandf. 89.

a) *Frink v. Potter*, 17 Ill. 406.

b) *Galena R. v. Yarwood*, 15 Ill. 468. *South Western R. v. Paulk*, 24 Ill. 356. *Buel v. New York R.* 31 N. Y. 314.

§ 548. But, undoubtedly, where the injury arises to a passenger from a rash and undue apprehension of danger on his part, as when a passenger, thinking himself in peril, leaps from a stage-coach to save himself, when in reality he is in no peril, the coach proprietor will not be liable. It is, however, a delicate point, and one which must be left for a jury on the evidence to determine.¹ (a) In Massachusetts,² at the trial in the Court of Common Pleas, before Williams, C. J., the plaintiff introduced evidence tending to prove, that, on the 23d of September, 1841, he and several other persons took outside seats, as passengers, on the top of the defendants' coach, to be conveyed from Boston to Cambridge; that on the way, in Court Street, in Boston, while proceeding at a moderate rate, and without coming in contact with any thing, the hind axletree of the coach broke, one of the hind wheels came off, and the coach settled down on one side, without being overset; that the plaintiff and some other outside passengers jumped from the top of the coach upon the pavement; and that the plaintiff's left arm was thereby badly injured. The defendants insisted, that if the plaintiff jumped from the coach without necessity, and that necessity brought upon him by them, they were not liable; and that, although a passenger might have jumped off without imprudence, his jumping off was to be considered as his own act, and was done at his own peril. Upon this point the learned judge directed the jury to inquire whether the plaintiff's jumping off was, under the existing circumstances, an act of reasonable precaution; and instructed them, that if the plaintiff was placed in such a perilous situation, in consequence of the defendants' failure to fulfil their obligations, that, as a prudent precaution, for the purpose of self-preservation, he was induced to leap from the coach, the owners were answerable for any injury he might have sustained thereby; although it might now appear that he might, without injury, have retained his seat. The jury, under this direction, returned a verdict for the plaintiff. (b)

¹ 1 Bell, Com. 372.

² *Ingalls v. Bills*, 9 Met. 1.

(a) *Caswell v. Boston & Worcester R.* 98 Mass. 194.

(b) In *Adams v. Lancashire R. L. R.* 4 C. P. 739, the door of a carriage, in which the plaintiff was being carried as a passenger on the defendant's

7. Their Duty as to an Observance of the proper Side of the Road, and as to avoiding Collision.

§ 549. In regard to persons meeting on horseback, there is no established rule requiring persons so meeting a horse or vehicle to turn to the right or to the left. The rules and directions for the mode of driving, in order to avoid collision, upon the public roads and highways of England, have become established by custom. The first of them is, that in meeting, each party shall bear or keep to the left; which is the reverse of the rule in this country; that is to say, in this country each party shall bear or keep to the right.¹

¹ By the Rev. Stat. of Massachusetts, c. 51, travellers in carriages, who meet on a road, are required, under a penalty, seasonably to drive their carriages to the right of the middle of the travelled part of the road; and they cannot avoid the penalty by seasonably turning to the right of the wrought part of the road, though they leave sufficient room for the travellers whom they meet to pass with convenience and safety, in the use of ordinary care and skill. With regard to the neglect of this duty, as a public offence, it can make no difference whether sufficient room is left for the other party to pass, if he had not also been guilty of negligence in not using

ordinary care. It is the negligence or wrongful act of the defendant that constitutes the public offence, irrespective of the want of ordinary care of the other party. Such would be the rule as to an indictment against an individual for a nuisance on the highway; though in a civil action for damages by a party travelling on such road, a very different rule might be applicable. *Commonwealth v. Allen*, 11 Met. 403. In a complaint, under the statute above referred to, against a traveller for not driving his carriage to the right of the middle of the travelled part of the road, it is not necessary to set forth a particular description of the road. *Ibid.* See

railway, flew open several times. The plaintiff shut the door three times, and in endeavoring to shut it the fourth time fell out and was injured. The train stopped at three stations between the time the door first opened and the last time, and another would have been reached in three minutes. There was room in the carriage for the plaintiff to sit away from the door. *Held*, that although the defendant was negligent, yet, as the inconvenience that the plaintiff would have suffered was slight, while the peril incurred was great, the plaintiff could not recover. It is to be noticed that in an English railway carriage the door is on the side. In *Gee v. Metropolitan R. L. R.* 8 Q. B. 161, the plaintiff, a passenger, left his seat and put his hand across a bar on the window of his carriage, with the intention of looking out to see the lights at the next station. The pressure caused the door to fly open and the plaintiff fell out. The jury found for the plaintiff; and, on leave being reserved to enter a nonsuit on the ground that there was no evidence of the defendant's liability, it was *held* that there was evidence, and that the verdict ought to stand. See also *Robson v. North Eastern R. L. R.* 10 Q. B. 271.

Secondly, that in passing, the foremost person bearing to the left, the other shall pass on the off-side. Thirdly, that in crossing, the driver shall bear to the left hand, and pass behind the other carriage.¹ But the rule is not inflexible, in England, that a driver is bound to keep on the regular side of the road; although, if he does not keep on the regular side, he is bound to use more care and caution, and keep a better lookout to avoid collision, than would be necessary if he were on the regular or proper side.² But that the law or usage of the road is not the criterion of negligence was expressly held in *Wayde v. Carr*.³ In this case, the defendant's carriage was on the wrong side of the road, and, in attempting to pass on the near inside of the off-side, the plaintiff sustained damage; and it was held, that it was for the jury to decide the ques-

post, §§ 556-563. (a) That the rule, in this country, is to take the right side of the road, *Wilson v. Rockland Man. Co.* 2 Harring. 481; *Brooks v. Hart*, 14 N. H. 307. In Kentucky it is provided, under a penalty, by the statute of 1843, that all vehicles of every kind, meeting, shall give to each other one half of the macadamized part of the road, each passing to the right. If any one be guilty of a violation of the requirements of this statute, he is not only liable to the penalty, but if his disregard of its provisions cause a conflict and injury, he should not only bear the loss, but may be rendered liable for any injury which is sustained in consequence of his illegal act. *Johnson v. Small*, 5 B. Mon. 25. By the true construction of the Rev. Stat. of Massachusetts, when a part of a road, which is wrought for travelling, is hidden by snow, and a path is beaten and trav-

elled on the side of the wrought part, persons meeting on such beaten and travelled path are required to drive their vehicles to the right of the middle of such path. *Jaquith v. Richardson*, 8 Met. 213. The law of the road by the same St. extends to all places appropriated to the purpose of passing with carriages, whether so appropriated by public authority, or by the general license of the owners thereof; and such owners themselves, while using their land as a road, must conform to the law. *Commonwealth v. Gammens*, 23 Pick. 201.

¹ 2 Steph. N. P. 984. 5 Petersdorf, Abr. 55. Story on Bailm. § 599. *Wayde v. Carr*, 2 Dow. & R. 25.

² *Pluckwell v. Wilson*, 5 Car. & P. 375.

³ *Wayde v. Carr*, 2 Dow. & R. 255. A person on the regular side of the road may be guilty of negligence. *M'Lane v. Sharpe*, 2 Harring. Del.

(a) Under this statute a master is not liable for damages sustained by a third person, in consequence of the omission of the servant seasonably to drive his master's vehicle to the right of the middle of the travelled part of a road. *Goodhue v. Dix*, 2 Gray, 181. The provisions of this statute, requiring travellers meeting each other "seasonably to drive to the right," do not apply when one vehicle is passing along one street and another is turning into said street from a cross-street. *Lovejoy v. Dolan*, 10 Cush. 495.

of negligence, without regard to the law and usage of the road. "Whatever," said the court, "might be the law of the road, it is not to be considered as inflexible and imperatively governing a case of this description. In the crowded streets of a metropolis, where this accident happened, situations and circumstances might frequently arise where a deviation from what is called 'the law of the road' would not only be justifiable but absolutely necessary. Of this the jury were the best judges, and, independently of the law of the road, it was their province to determine whether the accident arose from the negligence of the defendant's servant. They had acquitted him of negligence; and having all the circumstances of the case before them, had found their verdict for the defendant."

550. There may be occasions upon which it becomes the duty of the driver to deviate, to a reasonable extent, from the proper side of the road.¹ Thus, if a coachman is on the proper side, and sees a horse coming furiously along on the wrong side, it is the duty of the coachman to give way and avoid an accident; though, in so doing, he goes a little on what would otherwise be his wrong side of the road.²

551. If a coachman deviates even from the limits of the road, and thereby the coach is upset, the proprietors of the coach will be liable for any damage thereby occasioned, if it appears that the deviation from his duty to keep the road was not owing to a want of that skill and diligence which the law requires in him, but is altogether imputable to an unavoidable mistake, or sudden alteration of the guiding objects on the road.³

552. If the street or road is very broad, the driver is not bound to observe the proper side of the road. In *Wordsworth v. Willan*,⁴ which was an action on the case against the defendants, proprietors of a stage-coach, for the negligence of their servant in driving so near the path on the wrong side of the road that the plaintiff's horse, becoming frightened, and plunging, came in contact with the coach and broke his leg; it was said by Rook, J.,

Wayde v. Carr, 2 Dow. & R. 255.
Turley v. Thomas, 8 Car. & P.

The rules of the road, in England, are equally applicable to cases of persons on horseback, as well as to persons driving carriages. *Ibid.*

¹ Story on Bailm. § 599. *Crofts v. Waterhouse*, 3 Bing. 321. *Erie City v. Schwingle*, 22 Penn. State, 384.

² *Wordsworth v. Willan*, 4 Esp. 273.

that it could not be laid down as a certain rule, nor did public convenience require, that the driver is, under all circumstances, bound to keep on what is considered the proper side of the road; and that if there was no interruption of any other carriage, or the road was better, public convenience did not require that the driver should adhere to that law of the road. He took the rule to be, that if a carriage coming in any direction left sufficient room for any other carriage, horse, or passenger, on its proper side of the way, it was sufficient; but that it was evidence for the jury if the accident arose from want of that sufficient room; the driver was not to make experiments.

§ 553. If there is no other carriage to intercept the driver, he may pass on what part of the road he may think most convenient. It appeared in evidence, in *Aston v. Heaven*,¹ that the accident for which the action was brought arose from the horses having taken fright, and that no fault was imputable to the driver. It was held, that the owners were not liable in damages to the plaintiff, although it was proved that the carriage was driving in the middle of the road; whereas, had he been driving on the proper side, the accident might not have happened, on account of the great distance from that side where the bank was which occasioned the accident; Eyre, C. J., observing, that when there is no other carriage to intercept the driver, he may go on what part of the road he thinks fit.

§ 554. In *Mahew v. Boyce*,² the plaintiff was a passenger by a coach which was overturned in consequence of its coming in contact with the vehicle of the defendant, under the following circumstances: The coaches were both directed to the same place. The driver of the latter, during the night, attempted to pass the other coach at the top of a hill, and just as it was about to turn an angle in the road to the left. It was, however, contended, on the part of the defendant, that at that period his coach had sufficient room left to pass that on which the plaintiff was travelling, there being a space of seventeen feet wide to the right of the latter; and that the accident would not have occurred had it not been for the fact that the leading horses attached to the latter were driven in an oblique direction from the left to the right side of the road. But it appearing that the

¹ *Aston v. Heaven*, 2 Esp. 533.

² *Mahew v. Boyce*, 1 Stark. 423.

situation of the coach, by which the plaintiff was a passenger, had been seen some time before the defendant's coach came up, and that the driver of the latter might, by having driven nearer to the right side than he did, have effectually guarded against the mischief, Lord Ellenborough said: "This is decisive of the case; if it be practicable to pursue a course which is safe, and you follow so closely upon the track of another that mischief may ensue, you are bound to adopt the safe course. The coach on which the plaintiff was seated had at the time the whole free range of the road, and the driver had a right to occupy any part of it, unless he was aware of the proximity of the defendant's coach. This accident occurred in the night-time. Risk might consequently have been doubly apprehended. The driver of the coach belonging to the defendant ought therefore to have calculated upon the exercise of the other's right to traverse the whole space of the road, and have kept nearer the right side than he did, by which means this suit might never have been instituted." The verdict was for the plaintiff.

§ 555. In cases where parties meet on the sudden, and an injury results, the party on the wrong side of the road should be held answerable, unless it clearly appears that the party on the proper side had ample means and opportunities to prevent it. Chief Justice Best says, "But on the sudden a man may not be sufficiently self-possessed to know in what way to decide; and in such case the wrong-doer is the party who is to be answerable for the mischief; though it might have been prevented by the other party's acting differently." ¹

§ 555 *a*. Although a pedestrian or a person on horseback has a right of way, as well as the driver of a carriage or lumber wagon, yet the enjoyment of the right is regulated by reason. They cannot, for instance, compel a teamster, who has a heavy freight, to leave the smooth, beaten track of the road, if there is sufficient room to pass on either side. So where a road is narrow, and it is impracticable for a teamster to give a part of the way, and a horseman can pass by turning out of the road, it is his duty to do so. ²

§ 556. Whenever a collision of two carriages occurs, the driver, by whose negligence or misconduct it occurred, must of course be

¹ Chaplin *v.* Hawes, 3 Car. & P. 554.

² Beach *v.* Parmenter, 23 Penn. State, 196.

responsible for the consequences. But the rule in all cases where an action is brought for damage so occasioned is, that, if it appear that the damage was occasioned partly by the negligence of the plaintiff and partly by that of the defendant, the action cannot be maintained; and if the plaintiff's negligence in any way concurred in causing the damage, he is not entitled to recover.¹ As was said by Lord Ellenborough, "a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases," the learned judge continued to say, "of persons riding upon what is considered the wrong side of the road, that would not authorize another purposely to ride up against them; for one person being in default will not dispense with another's using ordinary care for himself."² The rule of the law thus laid down was declared by Parke, B., in the case of the Grand Junction Railway Company, to be "perfectly correct." This case was an action for the negligent management of a train of railroad cars, whereby it ran against another train in one of which the plaintiff was riding, and whereby he was injured. It was pleaded, that the parties having the management of the train in which the defendant was, managed it so negligently and improperly, that, in part by their negligence, the defendant's train ran against the other, and caused the injuries which the plaintiff received. It was held, that the plea was bad in form, as amounting to "not guilty;" and also bad in substance, for not showing, not only that the parties under whose management the plaintiff was were guilty of negligence, but also, that by ordinary care they could have avoided the consequences of the defendant's negligence.³

¹ *Pluckwell v. Wilson*, 5 Car. & P. 375. *Williams v. Holland*, 6 Car. & P. 23. *Munroe v. Leach*, 7 Met. 274. *Churchill v. Rosebeck*, 15 Conn. 359. *Simpson v. Hand*, 6 Whart. 311. *Rathbun v. Payne*, 19 Wend. 399. *Barnes v. Cole*, 21 Wend. 188. *Hartfield v. Rover*, 21 Wend. 615. *Brownell v. Flaggler*, 5 Hill, 282. The rule is the same in respect to carriers by water. *Vandeplank v. Miller*, 1 Moody & M. 169. *Luxford v. Large*, 5 Car. & P. 421. *Sills v. Brown*, 9 Car. & P. 601. And see *ante*, § 167, note; and *post*, Chap. XII. § 634 *et seq.*

² *Butterfield v. Forrester*, 11 East, 60. In this case it was held, that one who is injured by an obstruction in a highway against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction.

³ *Bridge v. Grand Junction R.* 3 M. & W. 244. In case, for driving a

§ 557. The important doctrine laid down in the preceding section has been repeatedly recognized and applied in this country.¹ (a) In Massachusetts² the action was an action on the case

coach of the defendant against the plaintiff's carriage, in which were two of his sons, and injured it and them, it was pleaded that the plaintiff's carriage was under the guidance and direction of one of his sons, who was driving it, and that the defendant, by his servant, was carefully and properly driving his coach; that if the plaintiff's son had driven his carriage carefully and properly, no collision would have taken place, nor any injury have been occasioned to the plaintiff's carriage or to his sons; but that the plaintiff's son drove the carriage so negligently and improperly, that it ran and struck against the defendant's coach, and by means thereof, and without any carelessness or improper conduct of the defendant by his servant, the defendant's coach ran and struck against the plaintiff's carriage, whereby the supposed damages in the declaration mentioned were occasioned; so that, if any damage was occasioned to the plaintiff's carriage, or to his sons, it was occasioned by the carelessness and negligence of the plaintiff's son so driving his carriage; without this, that the defendant, by his servant, so carelessly and improperly drove his coach, that by and through his carelessness and improper conduct in that behalf the defendant's

coach struck against the plaintiff's carriage, in manner and form, &c.; concluding to the country. The plea was held bad on special demurrer. Lord Abinger, C. B., said: "I am of opinion that this plea is bad. The principal ground on which a special plea amounting to the general issue has been held bad on special demurrer is, that it contains superfluous and unnecessary matter. As this plea concludes to the country, this forms the only objection to it; if it had concluded with a verification, it would have been more vicious, because it would drive the plaintiff, in his replication, to select some particular fact to take issue upon." *Gough v. Bryan*, 2 M. & W. 770.

¹ See *ante*, note to preceding section; *Brownell v. Flagglar*, 5 Hill, 282, and the cases there cited; *Harlow v. Humiston*, 6 Cow. 191; *Noyes v. Morris*, 1 Vt. 353; *Burckle v. New York Dry Dock Co.* 2 Hall, 151; *Lane v. Crombie*, 12 Pick. 176; *Munroe v. Leach*, 7 Met. 274; *Parker v. Adams*, 12 Met. 415; *Beers v. Housatonic R.* 19 Conn. 566; *Brooks v. Hart*, 14 N. H. 307; *Haring v. New York R.* 13 Barb. 9; *Carroll v. New York R.* 1 Duer, 571; *Center v. Finney*, 17 Barb. 94; *Munger v. Tonawanda R.* 4 Comst. 349; *Halderman v. Beckwith*,

² *Smith v. Smith*, 2 Pick. 621.

(a) *Chicago R. v. Fay*, 16 Ill. 558. *Button v. Hudson River R.* 18 N. Y. 248. *Owen v. Hudson River R.* 2 Bosw. 374. A passenger passing from the station-house to the cars over an unoccupied track has a right to rely to some extent upon proper and usual signals of warning to be given by trains or cars passing over the unoccupied track at such a place and under such circumstances. *Chaffee v. Boston & Lowell R.* 104 Mass. 108. It is not necessary for the plaintiff to prove care on his own part by directly affirmative evidence; but the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, on his part, in the circumstances

for an injury done to the plaintiff's horse by a wood-pile, which the defendant had placed in the highway; and it was held that as the plaintiff did not use ordinary care, by which the obstruction might have been avoided, he could not maintain the action. The defendant contended that the plaintiff did not use ordinary care, that the wagon in which he was driving, in descending the hill on which the accident happened, was overloaded; that he did not drive skilfully, and that he did not put a shaft-girth on. Parker, C. J., in giving the opinion of the court, said: "It would seem,

4 McLean, C. C. 286; *Spencer v. Utica R.* 5 Barb. 337; *Hudson v. Roberts*, 6 Exch. 697, 5 Eng. L. & Eq. 514; *Martin v. Great Northern R.* 16 C. B. 179, 30 Eng. L. & Eq. 473; *Aurora Branch R. v. Grimes*, 13 Ill. 585; *Brand v. Schenectady R.* 8 Barb. 368; *Quimby v. Vermont R.* 22 Vt. 393; *Trow v. Vermont R.* 24 Vt. 487; *Kerwhacker v. Cleveland*, 3 Ohio State, 172; *Washburn v. Tracy*, 2 D. Chip. 136; *Railroad Co. v. Aspell*, 23 Penn. State, 147. The case of *Butterfield v. Forrester* (*ante*, § 556) was cited and relied on by the Court of Appeals of South Carolina, in a case in which the judgment of the court was, that where a slave of the plaintiff, endowed with ordinary intelligence, and acquainted with the nature and manner of using a railroad, voluntarily laid himself down on the road and went to sleep, amidst grass so high as to obstruct the view at some distance, and in this situation, without any fault of the engineer, the engine going at its ordinary speed, passed over the body and killed the slave, the plaintiff could not recover against the company for the value of the slave killed. *Felder v. Cincinnati R.* 2 McMull. 404. *Burckle v. Dry Dock Co.* 2 Hall, 151, decides that no man can lay the foundation of an action against his own wrong, or by the breach of any duty on his part.

under which the injury was received. *Mayo v. Boston & Maine R.* 104 Mass. 137. In *Steves v. Oswego R.* 18 N. Y. 422, this rule was applied, although the defendant neglected to ring its bell as required by statute. See also *Butterfield v. Western R.* 10 Allen, 532; *Mackey v. New York R.* 27 Barb. 528; *Dascomb v. Buffalo R.* 27 Barb. 221; *Augusta R. v. McElmurry*, 24 Ga. 75; *Willis v. Long Island R.* 32 Barb. 398; *Clark v. Eighth Av. R.* 32 Barb. 657, 36 N. Y. 135. But see, as to the care required of a traveller when the railroad company neglects to ring the bell, *Ernst v. Hudson River R.* 35 N. Y. 38; *Beisiegel v. New York R.* 34 N. Y. 622. In *Ashmore v. Pennsylvania Steam Towing Co.* 4 Dutch. 180, in a contract of towage, the master of the boat towed agreed to keep a competent man at the helm while the tow was in motion. The tower ran on a known sand-bank, and the boat towed was lost. Held, that the plaintiff could recover, although there was no man at the helm of his boat at the time, the jury having found that his negligence did not contribute to the accident. And the fact that a passenger, injured by the negligence of the driver of a horse-car, was intoxicated at the time of the accident will not prevent his maintaining an action, unless his intoxication contributed to the injury. *Maguire v. Middlesex R.* 115 Mass. 239.

at first, that he who does an unlawful act, such as encumbering the highway, should be answerable for any direct damages which happen to any one who is injured, whether the party suffering was careful or not in his manner of driving or in guiding his vehicle, for it could not be rendered certain, whether, if the road were left free and unencumbered, even a careless traveller or a team-driver would meet with any injury. But on deliberation we have come to the conclusion that this action cannot be maintained unless the plaintiff can show that he used ordinary care; for without that, it is by no means certain that he himself was not the cause of his own injury. The party who obstructs a highway is amenable to the public in indictment, whether any person be injured or not, but not to an individual, unless it be shown that he suffered in his person or property by means of the obstruction; and where he has been careless it cannot be known whether the injury is wholly imputable to the obstruction, or the negligence of the party complaining. And considering the indulgence shown by the public to the citizens, in many places, to occupy a part of the highway for temporary purposes, leaving ample room for travellers, with ordinary care, to pass uninjured, the principle which requires that degree of care in order to entitle a party to damages, may be deemed salutary and useful. That such is the law, we are fully satisfied from an examination of the authorities cited.”¹ (a)

§ 558. Where a person, travelling with a horse and wagon, might, from an eminence in the road, have seen that a causeway at a considerable distance, which he intended to pass over, was covered with water, but when he descended the hill the causeway

¹ The learned judge laid much stress upon the decision in *Butterfield v. Forrester*, 11 East, 60, and cited in the preceding section.

(a) *Lucas v. New Bedford R.* 6 Gray, 64. In this case it was held that a person who enters the cars of a railroad corporation, not as a passenger, but to assist an infirm relative to a seat, must, in order to maintain an action against the corporation for an injury sustained while leaving the cars, show that he exercised due care, that the corporation was wanting in ordinary care, and that such negligence was the cause of the injury; and if he attempts to leave the cars after they have started, or, finding them in motion as he is going out, attempts to get off, he cannot maintain such an action, if his attempt causes or contributes to the injury; even if the corporation give him no special notice of the time of the departure of the cars, and are guilty of negligence in the manner of starting, which contributes to the accident.

was out of sight, until he had proceeded too far either to turn back or to go on with safety, it was held that hitherto he was not guilty of negligence; and, as he then used ordinary care in endeavoring to extricate his horse from the danger, but without success, he was held entitled to recover for the loss of the horse, which was drowned. The jury, in this case, were satisfied from the evidence that the loss of the horse was owing to the defect in the causeway, and that no mismanagement or negligence on the part of the plaintiff concurred in the loss.¹

§ 559. It is obvious that cases of alleged mutual neglect, like those above mentioned, must be determined by the jury. (a) In

¹ *Thompson v. Bridgewater*, 7 Pick. 188. And see *Sheffield v. Rochester* R. 21 Barb. 339.

(a) If the evidence for the plaintiff does not make out a legal cause of action, there is no doubt that it is within the power and that it is the duty of the court to take the case away from the jury. *Denny v. Williams*, 5 Allen, 1. So, where the plaintiff's evidence shows negligence on the part of the defendant, and the defendant's does not show contributory negligence on the part of the plaintiff, it is erroneous to submit the question of the plaintiff's contributory negligence to the jury. *Radley v. London R. L. R.* 9 Ex. 71. This principle has been extended to the case of a suit against a railroad company for damages, and it has been held that if the evidence of the plaintiff shows want of care on his part, or no evidence of negligence on the part of the defendant, the court should take the case away from the jury and decide it as a matter of law. Thus, in *Gavett v. Manchester R.* 16 Gray, 501, leaving a railroad car while the train was in motion was held such evidence of negligence as to justify the court in nonsuiting the plaintiff. See also *Lucas v. New Bedford R.* 6 Gray, 64; *Jeffersonville R. v. Swift*, 26 Ind. 459. So, of getting on a train of cars after it has started. *Harvey v. Eastern R.* 116 Mass. 269. So, of getting off the platform of a horse-car while in motion. *Nichols v. Middlesex R.* 106 Mass. 463. So, of voluntarily and unnecessarily standing upon the platform of a passenger car while the train is in motion. *Hickey v. Boston & Lowell R. Co.* 14 Allen, 429. So, where a passenger in leaving a station to go upon the highway unnecessarily or without valid excuse crosses the track of the railroad. *Bancroft v. Boston & Worcester R.* 97 Mass. 275. So, of attempting to cross over a train of cars between two freight cars shackled together, while the train was in motion. *Gahagan v. Boston R.* 1 Allen, 187. So, of a passenger putting his elbow out of the window of a railroad car. *Todd v. Old Colony R.* 3 Allen, 18; 7 Allen, 307. So, where a traveller on a highway, approaching a railroad crossing, did not look to see whether a train of cars was coming; and the facts that it was a stormy night, raining, blowing hard, and snowing some; that the highway was in very bad order; that neither the bell of the defendant's engine was rung nor the whistle blown, did

an action by the owner of a coach and horses against the driver of another coach, for driving the wheels of his coach upon one of

not take the case out of the rule, and make it a proper one for the consideration of the jury. *Butterfield v. Western R.* 10 Allen, 532. *Steves v. Oswego R.* 18 N. Y. 422. *Wilds v. Hudson River R.* 24 N. Y. 430. See also *Skelton v. London R. L. R.* 2 C. P. 631; *Frost v. Grand Trunk R.* 10 Allen, 387; *Burns v. Boston & Lowell R.* 101 Mass. 50; *Allyn v. Boston & Albany R.* 105 Mass. 77; *Goodfellow v. Boston, Hartford, & Erie R.* 106 Mass. 461; *Haring v. New York R.* 13 Barb. 9; *Havens v. Erie R.* 41 N. Y. 296; *Briggs v. Taylor*, 28 Vt. 180; *Philadelphia R. v. Hummell*, 44 Penn. State, 375; *New York R. v. Skinner*, 19 Penn. State, 298; *Toomey v. London R.* 3 C. B. (N. S.) 146. In *French v. Taunton Branch R.* 116 Mass. 537, the plaintiff, in attempting to cross a railroad track in a carriage, was struck by a car of a freight train, which had been separated from the rest of the train for the purpose of making a running switch. The plaintiff's evidence tended to show that she was driving with care, and in approaching the crossing saw a train pass, but saw no flagman and received no warning that another car was coming. At forty-six feet from the crossing she could have seen along the track forty-six feet in the direction from which the cars came; at thirty feet from the crossing she could have seen the track for half a mile; but she did not look in that direction, and gave as a reason therefor that she did not suppose that one train would follow another so closely. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury. See also *North Eastern R. v. Wanless*, L. R. 7 H. L. 12. See, however, a very similar case, where it was *held* that there was no evidence of the defendant's negligence. *Ellis v. Great Western R. L. R.* 9 C. P. 551. In *Gahagan v. Boston R.* 1 Allen, 187, 190, it is said that the question of the plaintiff's negligence is a question of fact for the jury, if there are any facts in dispute, or if there is any evidence upon which it is competent for the jury to find that the plaintiff used reasonable care, but that the burden is on him to show that he used ordinary care, and that if he offers no evidence that he was in the exercise of care, and the whole evidence shows that he was careless, the case should be taken away from the jury. But as the correctness of this position depends on the power of a judge to determine the question of fact whether certain things are or are not negligence, in a subsequent decision the court justified the right of a judge to determine this fact. In *Meesel v. Lynn R.* 8 Allen, 234, 236, *Chapman, J.*, speaking of the cases previously decided, said: "It is true that these decisions involve the consideration of facts as to which no evidence was offered. But they were well-known facts in respect to the power, speed, and management of railroad trains. The rule of law on this subject is well stated in 1 Greenl. Ev. § 6, as follows: 'Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction.' In the cases above cited, it ought to be known by all persons who have any thing to do with railroad trains that it is hazardous and inconsistent with the exercise of ordinary care to leave the seats provided for passengers and stand upon the platform or attempt to leave the train while it is in motion, or to sit with an elbow pro-

the horses attached to the plaintiff's coach, it was contended for the defendant, that, according to the evidence the action could not

jecting beyond the external surface of a window, or to cross a moving train by passing between the cars." That courts may judicially take knowledge of what is or is not negligence hardly seems to be justified by the things mentioned by Mr. Greenleaf, of which the court may take judicial notice. Negligence being then a question of fact, it naturally follows that courts should take a different view of the same state of facts. Thus while, as we have seen, the Supreme Court of Massachusetts considers putting the elbow out of a window such negligence as to justify the nonsuiting of the plaintiff, in Pennsylvania this was once not considered such negligence. *New Jersey R. v. Kennard*, 21 Penn. State, 202. So in regard to leaving a car while in motion. *Pennsylvania R. v. Kilgore*, 32 Penn. State, 292. But the same court have since held putting the arm out of a car window to be negligence. *Pittsburgh R. v. McClurg*, 56 Penn. State, 294. Whether a thing is or is not negligence under this rule seems to depend then on the general knowledge of the court, and not upon its legal knowledge. In Massachusetts the court has declared its inability to determine that riding on the outside platform of a horse-railroad car was such negligence that the plaintiff could not recover for an injury sustained through the fault of the carrier. *Meesel v. Lynn R.* 8 Allen, 234. See also *Wilton v. Middlesex R.* 107 Mass. 108; *Maguire v. Middlesex R.* 115 Mass. 239. So, as to parents letting their son, ten years old, be in the street with other boys after dark. *Lovett v. Salem R.* 9 Allen, 557. So, of a servant of a railroad going between cars in motion to uncouple them. *Snow v. Housatonic R.* 8 Allen, 441. So, where a person bought a ticket at a railroad station, and, at the request of the station agent, went with him towards the cars, without looking to see whether a train was approaching on a track he had to cross. *Warren v. Fitchburg R.* 8 Allen, 227. See also *Fox v. Sackett*, 10 Allen, 535; *Caswell v. Boston & Worcester R.* 98 Mass. 104; *Gaynor v. Old Colony R.* 100 Mass. 208; *Geddes v. Metropolitan R.* 103 Mass. 191; *Chaffee v. Boston & Lowell R.* 104 Mass. 108; *Mayo v. Boston & Maine R.* 104 Mass. 137; *Shaw v. Old Colony R.* 105 Mass. 342; *Wheelock v. Boston & Albany R.* 105 Mass. 203; *Williams v. Grealy*, 112 Mass. 79; *Craig v. New Haven R.* 118 Mass. 431; *Hinckley v. Cape Cod R.* 120 Mass. 257. In *Spoford v. Harlow*, 3 Allen, 176, it was held that the court could not say as a matter of law that riding on the fender or outside platform of an omnibus sleigh in the streets of Boston was such negligence as to warrant taking away the case from the jury. In New York, this is judicially considered negligence. *Spooner v. Brooklyn City R.* 31 Barb. 419; 36 Barb. 217. In New York, it is held to be a question for the jury whether it is negligence for a passenger to pass, at the request of an employee of a railroad, from one car to another while they are in motion, for the purpose of finding a seat. *McIntyre v. New York Central R.* 37 N. Y. 287. The duty of the court to submit the question of negligence to the jury, although the judges if they should sit as a jury would find that there was negligence, is shown by the case of *Paterson v. Wallace*, 1 Macq. 748; 28 Eng. L. & Eq. 48. See also *Railroad Co. v. Stout*, 17 Wall.

be maintained, as the driver of the plaintiff's coach was himself in fault, as he and the defendant were mutually running and cutting each other off to prevent each other going ahead. The court sustained this objection, and instructed the jury, that as the plaintiff's driver was in fault in the manner stated by the defendant's counsel, the action could not be sustained, and directed them to give a verdict for the defendant; which they did. To these instructions of the court the plaintiff alleged exceptions, and a new trial was granted, because the direction of the court to the jury assumed a fact as proved which should have been left to them on the evidence. The view of the case taken by Wilde, J., in giving the opinion of the court, was this: "We are of opinion that the fault of the plaintiff's driver was not satisfactorily proved. All that is proved is, that he had been in fault previously to the transaction complained of. But this was no justification for the defendant in the commission of the like fault. And it appears by the evidence reported, that the injury complained of was solely caused by the misconduct of the defendant. He drove the plaintiff's horses into a snow-drift; and it was testified by the witness, that Littlefield, the plaintiff's driver, tried to avoid him all he could."¹ This case, therefore, establishes the point, that evidence that the drivers of two coaches on the same route mutually

¹ *Monroe v. Leach*, 7 Met. 274.

657; *Bridges v. North London R. L. R.* 7 H. L. 213; *Coombs v. Purrington*, 42 Me. 332; *Beers v. Housatonic R.* 19 Conn. 566; *Johnson v. Hudson River R.* 20 N. Y. 65; *Trow v. Vermont R.* 24 Vt. 487; *Bigelow v. Rutland*, 4 Cush. 247; *Ernst v. Hudson River R.* 35 N. Y. 38; *Ireland v. Oswego Plank Road Co.* 3 Kern. 533; *Beisiegel v. New York R.* 34 N. Y. 622. The reason suggested in some cases for the propriety of taking away such cases from the jury, because of the sympathy which a jury has in favor of the plaintiff in a suit against a corporation, can hardly be deemed sufficient in law. See *Toomey v. London R.* 3 C. B. (N. S.) 146; *Haring v. New York R.* 13 Barb. 9. It is said by Byles, J., in *Fordham v. Brighton R. L. R.* 3 C. P. 368, 372, in a case where the plaintiff's hand was crushed, as he was getting into a railway carriage, by the guard closing the door: "The jury may have been (as they often are) far better judges of fact than the judge presiding at the trial." The case was affirmed, L. R. 4 C. P. 619. See also *Jackson v. Metropolitan R. L. R.* 10 C. P. 49. It is difficult to see, if a court should determine as a matter of law whether riding on the platform of a steam-car is negligence, why it should not also determine as a matter of law whether riding on the platform of a horse-car, or on the fender of a sleigh, is or is not negligence.

attempted several times to intercept each other's progress by "cutting each other off," is not sufficient to prove that in a subsequent collision on the same trip, they were both in fault.

§ 560. Where the plaintiff, in an action of trespass, for driving the carriage of the defendant against the plaintiff's, and over-setting it, thereby wounding the plaintiff, claimed that the injury occurred entirely through the negligence of the defendant, without any negligence on the plaintiff's part; and also that if the plaintiff was guilty of negligence, the defendant drove his carriage against the plaintiff's by design or gross negligence, and thereby caused the injury; and that in either of these events the plaintiff was entitled to recover; and the defendant did not claim to justify himself on the ground that the plaintiff was guilty of any negligence at the time when the collision took place, but by a course of misconduct pursued by the plaintiff, on the road, previous to the collision, and at some distance from the place where it happened; which misconduct of the plaintiff could not possibly concur in directly producing the injury complained of; it was held that the court might properly omit to charge the jury as to the effect of negligence on the part of the plaintiff.¹

§ 561. The general rule of law in respect to negligence is, that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover. Therefore, where the defendant negligently drove his horses and wagon against and killed an ass, which had been left in the highway, fettered in the forefeet, and thus unable to get out of the way of the defendant's wagon, which was going at an immoderate pace along the road, it was held that the jury were properly directed, that, although it was an illegal act on the part of the plaintiff so to put the animal on the highway, the plaintiff was entitled to recover. For, as the defendant, said Lord Abinger, might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there. Although, said Parke, B., the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief; and were this not so, a

¹ Churchill v. Roseback, 15 Conn. 359.

man might justify the driving over goods left on a public highway, or even of a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.¹ And, therefore, a passenger in a public conveyance who has been injured by the negligent management of another conveyance, cannot maintain an action against the owner of the latter if the driver of the former, by the exercise of proper care and skill, might have avoided the accident which caused the injury.² (a)

§ 562. The doctrine, that a plaintiff who has contributed to an injury occasioned by the negligence of the defendant, cannot recover a compensation in damages, does not apply where the plaintiff is a person incapable of exercising ordinary care and caution. Where, therefore, the defendant's servant left a horse and cart unattended in a public street, and the plaintiff, a child under seven years of age, during the driver's absence, climbed on the wheel, and other children urged forward the horse, whereby the plaintiff was thrown to the ground and the wheel fractured his leg; it was held, that on these facts the jury were justified in finding a verdict for the plaintiff, if they were of opinion that there was negligence on the part of his servant. And it was also held, that the co-operation of third parties to the injury was not a ground of defence, if the means of injury were negli-

¹ *Davies v. Mann*, 10 M. & W. 545. In *Brownell v. Flaggler*, 5 Hill, 282, it was *held*, that where there had been mutual neglect, the plaintiff might recover in an action on the case, if the evidence showed intentional wrong on the part of the defendant. The above case of *Davies v. Mann* was cited by Lord Denman, C. J., in a case in which it was *held*, that if property (as oysters) be placed in the channel of a public navigable river, so as to amount to a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has room to pass with-

out so doing; for an individual cannot abate a public nuisance if he is not otherwise injured by it than as one of the public; and therefore the fact, that such property was a nuisance, is no excuse for running upon it negligently. And the learned judge said, that "as a general rule of law, every one, in the conduct of that which may be harmful to others if misconducted, is bound to the use of due care and skill; and the wrong-doer is not without the pale of the law for this purpose." *Colchester v. Brooke*, 7 Q. B. 339.

² *Thorogood v. Bryan*, 8 C. B. 115.

(a) See *Radley v. London R. L. R.* 9 Ex. 71, reversed, L. R. 10 Ex. 100; *post*, § 636. If a person is on the top of a stage-coach with the consent of the driver, and there are seats there for passengers, his being there cannot be imputed to him as negligence. *Caldwell v. Murphy*, 1 Duer, 233.

gently left where it was extremely probable that they would be set in motion.¹ (a)

¹ *Lynch v. Nurdin*, 4 Per. & D. 672; 1 Q. B. 29.

(a) Some doubt was thrown on this case in *Lygo v. Newbold*, 9 Exch. 302; and subsequent cases in England, though they do not directly overrule it, leave it to be inferred that it would not now be followed. Thus in *Singleton v. Eastern Counties R. 7 C. B. (N. S.) 287*, a child three years and a half old strayed on a railway and had its leg cut off. When the child was seen the whistle was blown, but no attempt was made to stop the engine. The decision is briefly given as follows: Erle, C. J.: "The plaintiff was wrongfully upon the railway; and without saying any thing to detract from the authority of the cases cited, I must confess I was wholly unable to discover any evidence of negligence on the part of the servants of the company. Williams, J.: I also think there was no negligence made out on the part of the company. There was nothing to show how the children got on to the railway. All was mere conjecture and surmise." See *Williams v. Great Western R. L. R. 9 Ex. 157*. In *Hughes v. Macfie*, 2 H. & C. 744, the defendants occupied a warehouse on one side of a street into which their cellar opened. They had taken up the lid of the cellar, and left it nearly upright against their wall. The plaintiff, a child five years old, got on the cross-bars of the lid, jumped from it, and in jumping part of his clothing caught on the lid, and it was pulled over upon him. Pollock, C. B., delivering the judgment of the court, said: "Had he been an adult, it is clear he could have maintained no action. He would voluntarily have meddled for no lawful purpose with that which, if left alone, would not have hurt him. He would, therefore, at all events, have contributed by his own negligence to his damage. We think the fact of the plaintiff being of tender years makes no difference. . . . Cases were referred to, supposed to be in favor of the plaintiff. We think none are decisive of this case, and no case establishes a principle opposed to our view, which is, that the nonsuit was right." Another child was also injured when the lid was pulled over, and the court *held* that he could not recover if he was playing with the child who pulled it over; otherwise he could, as the accident would then be the result of the joint negligence of the defendants and the child who pulled the lid over. See also *Mangan v. Atterton*, L. R. 1 Ex. 239. *Waite v. North Eastern R. Ellis, B. & E. 719*, affirmed in the Exchequer Chamber, *Ellis, B. & E. 728*, presents the question in a different form. A child five years old was taken to a railway station by its grandmother. She bought a ticket for herself and one for the child. In crossing the track the child was injured by an accident caused by the joint negligence of the railway company and the grandmother. *Held*, that the child could not recover damages. The grandmother was considered as the contracting party and as having charge of the child. In this country the doctrine of *Lynch v. Nurdin* has been followed in *Robinson v. Cone*, 22 Vt. 213; *Rauch v. Lloyd*, 31 Penn. State, 358; *Pennsylvania R. v. Kelly*, 31 Penn. State, 372; *Philadelphia R. v. Spearn*, 47

8. Their Duty to avoid Injury to Foot-Passengers.

§ 563. All persons have a right to walk in a public highway, if they observe reasonable care to avoid carriages; (a) and they are entitled to the exercise of reasonable care on the part of persons driving carriages along it. Thus, in an action of trespass for injuring the plaintiff by driving a cart against him, it appeared that the plaintiff was walking in the carriage-way in the neigh-

Penn. State, 300; *Smith v. O'Connor*, 48 Penn. State, 218; *Daley v. Norwich R. 26 Conn.* 591; *East Tenn. R. v. St. John*, 5 Sneed, 524. See also *Railroad Co. v. Gladmon*, 15 Wall. 401; *Railroad Co. v. Street*, 17 Wall. 567. But the law is the other way in New York. *Hartfield v. Roper*, 21 Wend. 615. *Lehman v. City of Brooklyn*, 29 Barb. 236. *Mangam v. Brooklyn City R.* 36 Barb. 230; 38 N. Y. 455. *O'Mara v. Hudson River R.* 38 N. Y. 445. So in Massachusetts. *Wright v. Malden R.* 4 Allen, 283. See also *Pittsburgh R. v. Vining*, 27 Ind. 513; *Lafayette R. v. Huffman*, 28 Ind. 287. In *Lovett v. Salem R.* 9 Allen, 557, it was held that the court could not decide, as matter of law, that permitting a boy of ten years of age to be in the street with other boys after dark was such negligence as to prevent him from recovering damages for a personal injury sustained by him from being wrongfully compelled to leave a street railway car while the same was in motion, although he had wrongfully got upon the same. In *Lynch v. Smith*, 104 Mass. 52, a boy four years and seven months old was run over in the street by a hack. Held, that whether it was negligence in the parents to allow him to be in the street unattended was a question of fact for the jury. See also *Carter v. Towne*, 98 Mass. 567; *Lane v. Atlantic Works*, 107 Mass. 104, 111 Mass. 136; *Elkins v. Boston & Albany R.* 115 Mass. 190; *Oldfield v. New York R.* 3 E. D. Smith, 103; *Chicago v. Major*, 18 Ill. 349; *Galena R. v. Jacobs*, 20 Ill. 478; *Chicago v. Starr*, 42 Ill. 174; *Schmidt v. Milwaukee R.* 23 Wis. 186. As to the care required of a deaf person, see *Cleveland R. v. Terry*, 8 Ohio State, 570; *Illinois R. v. Buckner*, 28 Ill. 299.

(a) A railroad is liable for a defect in the public highway caused by its misfeasance or non-feasance. *Snow v. Housatonic R.* 8 Allen, 441. *Gillett v. Western R.* 8 Allen, 560. *Oakland R. v. Fielding*, 48 Penn. State, 320. *Veazie v. Penobscot R.* 49 Me. 119. And if a railroad company has made a private crossing over its track at grade, in a city, and allow the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, it may be held liable in damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and is injured by a collision which occurs through the flagman's carelessness. *Sweeny v. Old Colony R.* 10 Allen, 368. See, as to the duty of a railroad towards a shipper of freight engaged in lading his goods on the train, *Stinson v. New York R.* 32 N. Y. 333.

borhood of London, about ten o'clock in the evening, when the defendant who was driving a taxed cart, turned out from behind a post-chaise, and drove against the plaintiff, and knocked him down. It was held that the plaintiff was entitled to recover. It was, however, proved that the foot-path was in a bad state, and seldom used; but Denman, C. J., observed: "A man has a right to walk in the road if he pleases. It is a way for foot-passengers as well as carriages. But he had better not, especially at night, when carriages are passing along."¹ It is quite clear, at all events, that a foot-passenger has a right to cross, and that persons driving carriages along the road are liable if they do not take care so as to avoid driving against the foot-passenger who is crossing the road.² If a driver of a vehicle, therefore, cannot pull up because his reins break, that will be no ground of defence, as he is bound to have proper tackle.³ So when a horse, being frightened, runs away, and damage is done, it is no ground of defence that the chain-stay of the cart to which the horse is attached breaks, and thus frightens the horse.⁴ If a horse and carriage are left standing in a street and without any person to watch them, the owner is liable for any damage done by them, although it is occasioned by the act of a passer-by, in striking the horse; for if a man chooses to leave a horse and carriage standing in the street, he must take the risk of any mischief that may be done in consequence.⁵ In such case (and the horse be unfastened) the owner of the animal is responsible to any person who is injured thereby, even if the habits of the animal are such as to induce the belief of safety in so leaving it; and evidence of reason for such belief, in an action for an injury sus-

¹ *Boss v. Litton*, 5 Car. & P. 407.

² *Cotterill v. Starkey*, 8 Car. & P. 691. And see *Wakeman v. Robinson*, 1 Bing. 213. In the Superior Court of New York, January 5, 1849, there was an action to recover damages for injuries received by the plaintiff, by one of the defendant's stage-coaches. The plaintiff, an aged lady (upwards of seventy), while crossing the Third Avenue, one afternoon, was run over by one of the before-mentioned coaches, and had her arm broken.

The verdict in her favor was for \$1,500. Reported for the "Journal of Commerce" of January 6, 1849.

³ *Cotterill v. Starkey*, *ib. sup.*

⁴ *Welsh v. Lawrence*, 2 Chitt. 262. And see *Smith v. Smith*, 2 Pick. 621.

⁵ *Illige v. Goodwin*, 5 Car. & P. 190. In this case the plaintiff was a china-man in St. Paul's Churchyard, London; and the cart of the defendant (a scavenger) backed against the window of the plaintiff's shop, and broke a quantity of china.

tained in consequence of such negligence, if given in the cause, must be disregarded by the jury.¹

§ 564. But, according to the doctrine which has already been laid down, applicable to collision of carriages, &c.,² whenever an action is brought for an injury to a person in crossing a road or street by driving against him and by knocking him down, the jury must be satisfied that the injury was attributable to the negligence of the driver, and to that alone, before they can find a verdict for the plaintiff; and if they think that the injury was occasioned, in any degree, by the improper conduct of the plaintiff in crossing the road in an incautious and imprudent manner, the defendant will be entitled to a verdict.³ Thus, if a person in a public street in a city, sees an omnibus coming, however furiously, and he will be reckless and headstrong enough to try to cross the street, and is run over, he cannot recover in an action against the proprietors of the omnibus, as no one has a right of action, if he meets with an accident which by ordinary care he might have avoided.⁴

§ 565. In Pennsylvania,⁵ it appeared that the plaintiff was walking in the middle of one of the most frequented streets of the town of Wilkesbarre, in that State, where there were sidewalks for footmen, when the defendant, in driving his horses, in a sleigh, rapidly along, ran against him and injured him, for which he brought an action of trespass. On the trial, the plaintiff offered to prove that at the time of the occurrence the defendant was intoxicated. The defendant objected to the evidence, and the court rejected it, and sealed a bill of exceptions at the instance of the plaintiff. The court below instructed the jury, that, if the injury done to the plaintiff was a consequence of the negligence of the defendant alone, he was entitled to recover damages; but if it was occasioned partly by the negligence and carelessness of both parties, the plaintiff was not entitled to recover. This direction, and the rejection of the evidence mentioned, were the subjects of the errors assigned. *Per Curiam*: "The direction was right; and if there was error, it was on the part of the jury.

¹ Overington v. Dunn, 1 Miles, 39.

⁴ Wolf v. Beard, *ub. sup.*

² See *ante*, § 556 *et seq.*

⁵ Wynn v. Allard, 5 Watts & S.

³ Hawkins v. Cooper, 8 Car. & P. 544.
475; Wolf v. Beard, 8 Car. & P. 373.

The principle, that there is no recourse by action for an injury which is the consequence of negligence on both sides, was laid down by this court,¹ which was a case of negligence in the collision of ships. But the law of the particular case was laid down in this instance, by the court below, in exact conformity to the direction of Mr. Justice Alderson,² that a person who leaves the ordinary side of the road is bound to use more care and diligence, and to keep a better lookout to avoid concussion than would be requisite if he were to confine himself to the proper side. It was for the jury, therefore, to say, under all the circumstances, whether the plaintiff was chargeable with negligence, having left the sidewalk, in not looking behind as well as before, to avoid contact with persons riding or driving in the middle of the street. If he was, the defendant would be answerable only for negligence so wanton and gross as to be evidence of voluntary injury. But the evidence of intoxication ought to have been received; not because the legal consequences of a drunken man's acts are different from those of a sober man's acts, but because, where the evidence of negligence is nearly balanced, the fact of drunkenness might turn the scale, inasmuch as a man partially bereft of his faculties would be less observant than if he were sober, and less regardful of the safety of others. For that purpose, but certainly not to inflame the damages, the evidence ought to have been admitted." Judgment was reversed, and a *venire de novo* awarded. The liability for injuries to foot-passengers, occasioned by a collision with railroad cars or engines is the same as that which arises in respect to a collision between two common carriages meeting on the highway.³ (a)

¹ *Simpson v. Hand*, 6 Whart. 320. ² *Brand v. Troy R.* 8 Barb. 368.

³ *Pluckwell v. Wilson*, 5 Car. & P. And see *ante*, §§ 523, 566 *et seq.*
379, and cited *ante*, § 556.

(a) See *Shaw v. Boston R.* 8 Gray, 45; *Gahagan v. Boston R.* 1 Allen, 187; *Fletcher v. Boston R.* 1 Allen, 9; *Bailey v. New Haven Co.* 107 Mass. 496; *Elkins v. Boston & Albany R.* 115 Mass. 190; *French v. Taunton Branch R.* 116 Mass. 537; *Bilbee v. London R.* 18 C. B. (N. S.) 584; *Stapley v. London R. L. R.* 1 Ex. 21; *Stubley v. London R. L. R.* 1 Ex. 13; *Lunt v. London R. L. R.* 1 Q. B. 277; *Skelton v. London R. L. R.* 2 C. P. 630; *Ellis v. Great Western R. L. R.* 9 C. P. 551; *Williams v. Great Western R. L. R.* 9 Ex. 157; *Cliff v. Midland R. L. R.* 5 Q. B. 258; *Wanless v. North Eastern R. L. R.* 6 Q. B. 481; *North Eastern R. v. Wanless*, L. R. 7 H. L. 12; *Wilds v. Hudson*

9. Their Duty to avoid Injury to Property on the Wayside.

§ 566. It is the duty of the proprietors of railroads and steamboats, and of their agents and servants, in the transportation of passengers as well as of goods, so to manage their fires, while their locomotives or boats are passing buildings on the route of travel, that no fire shall be communicated to such buildings. Owners of land on the shore of a river or lake, or of land adjoining the track of a railroad, are not prohibited from building thereon, and they are so far entitled to protection from persons lawfully passing the same with vessels or carriages propelled by steam, as to be secured against such a want of proper precaution on their part, the consequence of which is to set the buildings on fire. This is in conformity to the familiar maxim, *sic utere tuo ut alienum non lædas*. In an action for injuries so happening to buildings by the owner of them, it is competent for him to prove that experienced persons were accustomed to use precautions which the defendants neglected. Persons erecting buildings in places such as above-mentioned, though they assume the risk of more than ordinary danger from accidental fires, they do not assume the risk of another's tortious negligence.¹ It seems to be the doctrine in this country, that negligence being the gist of the action in these and like cases, it must be proved, and the burden of proof is on the plaintiff; that the defendant's fire being law-

¹ Cook v. Champlain Transp. Co. 1 Denio, 91.

River R. 29 N. Y. 315; Newsom v. New York R. 29 N. Y. 383; Brown v. New York R. 32 N. Y. 597; Beisiegel v. New York R. 34 N. Y. 622; Ernst v. Hudson River R. 35 N. Y. 9; Mackay v. New York R. 35 N. Y. 75; Philadelphia R. v. Spearen, 47 Penn. State, 300; North Penn. R. v. Heileman, 49 Penn. State, 60; Wakefield v. Connecticut R. 37 Vt. 330; Telfer v. Northern R. 1 Vroom, 188. Where a railway company crosses a highway at grade under the sanction of a statute, it must keep the crossing in a proper state for the passage of carriages across the rails, and if a carriage is damaged in consequence of the rails being too high above the surface of the highway the company is liable. Oliver v. North Eastern R. L. R. 9 Q. B. 409. If a railroad corporation neglects to give a signal required by statute on approaching a highway crossing at grade, it is liable to one injured thereby, although the injury is caused from the fright of the horse which he is driving, not guarded against for want of such warning. Norton v. Eastern R. 113 Mass. 366. But it is not negligence not to give a signal when approaching a highway crossing not at grade, unless required to do so by statute. Favor v. Boston & Lowell R. 114 Mass. 350.

fully kindled, it being an element applied to many valuable and useful purposes, and may become destructive from causes not subject to human control, the fact that an injury has been done to others, is not in itself evidence of negligence. Thus, in an action for injury done to the plaintiff's land and fences, alleged to have been occasioned by the defendant's carelessness in setting a fire on his own land, the burden of proof, it was held, was on the plaintiff to show that the injury was caused by the neglect or misconduct of the defendant.¹(a) Again, where a locomotive, belonging to a railroad company, drawing a train of cars, was passing, some sparks from the smoke-pipe passed directly therefrom to the roof of a building of the plaintiff standing eighteen inches from the side of the road, whereby the building was set on fire and consumed; it was held, in an action against the company, that the company was not liable.² One of the facts deserving of notice in this case is, that the plaintiff placed his building in the position it was after the road was built; (b) but it is apprehended that the owner might have so built in close proximity to the railroad, and although the house would be more exposed than it would be at a greater distance, yet this does not exempt the company's servants from the obligation of care, nor screen the company from the consequences of their negligence.³ It being a perfectly well-known rule, that in the construction of a grant, when any thing is granted, all the means to attain it, and the expected effects of it, are granted also; when a grantor conveys a certain definite parcel of land for the purpose of constructing a railroad out of a much larger parcel retained by him, the grant is subject to all the consequences necessarily attendant upon such a use of the same; and particularly such as would result from the running of engines, and the consequent exposure of property, on his adjacent land. So that, if while the railroad company is in lawful pursuit of its legitimate business, a fire is communicated

¹ *Bachelder v. Heagan*, 18 Me, 32.

³ *Cook v. Champlain Transp. Co.*

² *Burroughs v. Housatonic R.* 15 *ub. sup.* *Railroad Co. v. Yeiser*, 8 Conn. 124. See also *Maule v. Wilson*, Barr, 366.

² *Harring*. Del. 493.

(a) *Sheldon v. Hudson River R.* 29 Barb. 226. *Fero v. Buffalo R.* 22 N. Y. 209. *Hinds v. Barton*, 25 N. Y. 544.

(b) See *Macon R. v. McConnell*, 27 Ga. 481.

to the grantor's remaining lands (woodland, for example), by a spark from the engine, by which he sustains damage, it is *damnum absque injuria*, and the company will not be mulcted in damages, unless upon the most clear proof of negligence.¹

§ 566 *a*. In England, the fact that premises have been set on fire by sparks emitted from a passing railroad engine, it seems, is *prima facie* evidence of negligence on the part of the company, rendering it incumbent on the company to show that some precautions had been adopted by them reasonably calculated to prevent such accident. Thus, where it appeared in evidence, in an action against a railroad company for setting fire to a building near the road by sparks of fire having escaped from the company's engines, that shortly after the engine had passed near to where the building was the latter was observed to be on fire; that sparks or ignited matter had been seen on various occasions to be emitted by the company's engines; that the emission of sparks depended on the rate at which the engines were impelled, having reference to their power, and there were other modes by which it could be prevented; it was held, that the case showed a *prima facie* case of negligence, for which the company was responsible.² (*a*)

§ 567. Cases, therefore, of damage done to buildings by sparks of fire, or other igneous matter from the engines of steamboats, or locomotives on railroads, in ordinary use, are proper for the jury; who must be satisfied that every proper precaution was observed to avoid such damage. In an action against a railway company, the declaration stated that the defendants, by their servants, so carelessly, negligently, and improperly managed their steam-engine, and the fire therein contained; that through such negligence, &c., divers sparks and portions of said fire passed from the steam-engine of the defendants to and upon a certain rick of beans of the plaintiff, standing in a field near the said railway, which, by means thereof, became ignited and consumed. The plea was "not guilty;" and in a special case, stated for the opinion of the court under a judge's order, it was stated that the plaintiff had

¹ *Rood v. New York R.* 18 Barb. 80.

² *Piggot v. Eastern Counties R.* 3 C. B. 229.

(*a*) See *Bass v. Chicago R.* 28 Ill. 9; *Illinois Central R. v. Mills*, 42 Ill. 407; *Ohio R. v. Shanefelt*, 47 Ill. 497; *Illinois Central R. v. Frazier*, 47 Ill. 505.

erected the rick about eleven yards from the rails of the railway; that the engines and boiler used upon this railway were such as are usually employed on railways, and were used at the time of setting fire to the rick, in the ordinary manner, and for authorized purposes. It was held, that upon this statement there was evidence for the jury on the question of negligence in the defendants, and that they were not entitled to a nonsuit; and consequently that the case was improperly stated for the opinion of the court. Maule, J., said: "The only question of law here is, whether, upon this statement of the evidence, the plaintiff ought to be nonsuited. I think clearly not; because, if the case went to the jury, there is evidence in which they might find negligence in the defendants."¹ (a)

¹ Aldridge v. Great Western R. 3 Man. & G. 515. One who is exercising a public trade or business which requires the use of a steam-engine, is liable for any injury to another in consequence of its insufficiency. Spencer v. Campbell, 9 Watts & S. 32. It has been recognized as law, in many ancient decisions in England, that an action lies for any act done by a man in using his own property, whereby the rights of another are injured, unless such act be altogether inevitable and beyond his control. In one instance, the action was for so negligently keeping a fire in a field, that it communicated to the plaintiff's adjoining close, and burnt his heath. After verdict for the plaintiff the defendant moved in arrest of judgment, and it was said: "And in fact in this case the defendant's servant kindled the fire by way of husbandry, and a wind and tempest arose and drove it into his neighbor's field;" and the court said: "The fire in his field is his fire as well as that in his house. He made it, and must see that it does

no harm, and answer the damage if it does. Every man must use his own so as not to hurt another; but if a sudden storm had risen which he could not stop, it was matter of evidence, and he should have shown it." Tuberville v. Stampe, 1 Ld. Raym. 264; 1 Salk. 13. That cases of this sort fall within the general rule of law which requires that a man shall so use his own property as not to injure or destroy that of another; and that they are neither cases of contract or bailment, see Vaughan v. Menlove, 4 Scott, 244, recognizing the doctrine in Tuberville v. Stampe, *ub. sup.* In conformity to the maxim *sic utere tuo, &c.*, where the defendants dug a canal for the purposes authorized by their charter of incorporation, and were obliged to blast rocks with gunpowder, and the fragments were thrown against, and injured the plaintiff's house; it was held, that the defendants were liable, though no negligence was alleged or proved. Kay v. Cohoes Co., 2 Comst. 159.

(a) See Huyett v. Philadelphia R. 23 Penn. State, 373; Mansfield Iron Works v. Willcox, 52 Penn. State, 377; Sheldon v. Hudson River R. 4 Kern. 218; Vaughan v. Taff Vale R. 3 H. & N. 743, 5 H. & N. 679; Freemantle v. London R. 10 C. B. (N. S.) 89; Smith v. London R. L. R. 5 C. P. 98,

§ 567 *a*. But besides decisions at common law, on the subject of the responsibility for injuries occasioned by sparks from a locomotive, there have, in this country, been several instances of a judicial construction of statutory law on the subject. By the statute law of Massachusetts it is provided, that, when any injury is done to a building of any person "by fire communicated" by a locomotive engine, the corporation shall be responsible in damages to the person so injured; and it has been held, that, where a shop adjoining a railroad track was destroyed by fire so communicated, and while the shop was burning, the wind wafted sparks from it across a street upon a house, and set it on fire, the owner of the house was entitled to recover.¹(*a*) In Maine, railroad companies are liable by statute for injuries by fire communicated by locomotives to buildings or other property. The court held, that for injuries to other property, a railroad company will only be responsible in consequence of negligence or imprudence in conducting their locomotives.² A legislative act of

¹ *Hart v. Western R.* 13 Met. 99. ² *Chapman v. Atlantic R.* 37 Me. 288.
And see *Lyman v. Boston R.* 4 Cush. 92.

affirmed in *Exch. Ch. L. R.* 6 C. P. 14; *Frankford Turnpike Co. v. Philadelphia R.* 54 Penn. State, 345. A company authorized to build a tramroad for the passage of wagons, &c., but with no express power given by statute to use a locomotive engine, is liable at common law for a fire caused by a spark from an engine, although there is no negligence. *Jones v. Festiniog R. L. R.* 3 Q. B. 733.

(*a*) See *Ross v. Boston R.* 6 Allen, 87; *Ingersoll v. Stockbridge R.* 8 Allen, 438; *Perley v. Eastern R.* 98 Mass. 414; *Safford v. Boston & Maine R.* 103 Mass. 583; *Pierce v. Worcester & Nashua R.* 105 Mass. 199; *Grand Trunk R. v. Richardson*, 91 U. S. 454. In *Daniels v. Hart*, 118 Mass. 543, it was held that trustees, to whom a mortgage of the franchises, properties, and rights of a railroad corporation has been executed for the benefit of the bondholders, with the consent of the Legislature, and who are in possession under it for breach of condition, are liable in damages under the Gen. Sts. c. 63, §§ 101, 115-119, for injuries to land upon the line of the railroad from fire caused by a locomotive engine, which belongs to another railroad corporation, and is running upon the mortgaged road under an agreement between the trustees and a corporation owning the engine. *Hooksett v. Concord R.* 38 N. H. 242. In *Ryan v. New York R.* 35 N. Y. 210, the defendant's locomotive through negligent management set fire to a wood-shed belonging to the defendant; from this the fire communicated to the plaintiff's house. Held, that the plaintiff had no cause of action against the defendant, the damage being too remote.

Maryland, of 1837, made a railroad company responsible in damages for property injured by fire, caused by an engine on the road, whether there was negligence or not. An act of the State of 1838, provides that such company shall be responsible, unless the company can prove to the satisfaction of the tribunal before which the suit is tried that the injury has been done "without any negligence" on their part. The last act being, in regard to negligence, inconsistent with the first, therefore, in that respect repeals it, and restores the rule of the common law, except so far as to cast the *onus* of proving the absence of negligence on the defendant.¹ (a)

§ 567 *b*. In addition to injuries and nuisances occasioned in the mode above stated, the authorities represent other legal intolerances. As for instance, it has been held, that an action may be sustained against a railroad company for a nuisance in running their cars or engines, ringing bells, blowing off steam, and making other noises in the neighborhood of a church, or meeting-house, on the Sabbath, and during public worship, which may so molest the congregation worshipping there, as greatly to depreciate the value of the house, and render the same unfit for a place of religious worship.² And yet, where a horse, while being led along a highway, is so frightened by an engine and train of cars rapidly passing along a railroad near by, that he bursts a blood-vessel and dies, no action will lie against the company for the injury, for an authority by the legislature to use an engine is an authority to make a noise.³ (b)

¹ Baltimore R. v. Woodruff, 4 Md. 242.

² First Baptist Church v. Schenectady R. 5 Barb. 79.

³ Moshier v. Utica R. 8 Barb. 427.

(a) A subsequent act passed in 1846 requires that the railroad company shall, in order to exempt itself from liability, prove "that the damage or injury sustained was the result of unavoidable accident." In Baltimore R. v. Lamborn, 12 Md. 257, it was *held*, that although the railroad was in fault, the plaintiff could not recover if his negligence contributed to the accident. See also Keech v. Baltimore R. 17 Md. 32.

(b) See Flint v. Norwich & Worcester R. 110 Mass. 222. In Jones v. Housatonic R. 107 Mass. 261, a railroad corporation had a derrick which projected over the highway, for the purpose of unloading freight. *Held*, that the right of the corporation so to use the highway was subordinate to the lawful use of the highway for the general purposes of travel, and that it was not entitled to place or maintain structures in the highway, the effect of which

§ 567 *c.* Among the injuries done by the passing of railroad trains are such as are done to stray cattle. It is well settled that the proprietors of a railroad are not under obligation to fence their road to prevent cattle from straying upon it, unless they are required so to do by statute.¹ (*a*)

¹ *Ricketts v. East India Docks R.* 12 C. B. 160; 12 Eng. L. & Eq. 521. *Lord v. Wormwood*, 29 Maine, 282, and many cases therein cited. *Trow v. Vermont R.* 24 Vt. 487. *Griffin v. Martin*, 7 Barb. 237. *Kerwhacker v. Cleveland R.* 3 Ohio State, 172. *Underhill v. New York R.* 21 Barb. 489. *Cornwall v. Sullivan R.* 8 Foster, 160, and cases therein referred to. *Williams v. Michigan Central R.* 2 Gibbs, 259. See Law Rep. for June, 1853, p. 83. The following is the law on the subject: "It is an act of negligence to suffer cattle to be at large in a highway at railroad crossings. Therefore, where the owner of a cow allowed her to be at large in the highway, and upon the railroad track, at the usual time for the passenger train to pass, and the cow was killed by the train of cars; the owner of the cow could not recover the value of the cow of the railroad company. *Clark v. Syracuse R.* 11 Barb. 112. As a general rule, when a beast is wrong-

would naturally be to alarm the animals used thereon. See, as to the liability of a railroad to the owner of a house destroyed by fire in consequence of the locomotive running over and cutting hose which was across the track, *Mott v. Hudson River R.* 8 Bosw. 345, 1 Rob. N. Y. 585; *Metallic Compression Co. v. Fitchburg R.* 110 Mass. 277.

(*a*) *Stearns v. Old Colony R.* 1 Allen, 493. *Baxter v. Boston & Worcester R.* 102 Mass. 383. See *Sawyer v. Vermont & Massachusetts R.* 105 Mass. 196; *Baltimore R. v. Lamborn*, 12 Md. 257; *Knight v. New Orleans R.* 15 La. Ann. 105. A statute requiring railroads to be fenced, is a regulation for the safety of passengers, and the legislature has the right to impose such a duty on a railroad already chartered, although the charter is not amendable. *New Albany R. v. Tilton*, 12 Ind. 3. *Indianapolis R. v. Kercheval*, 16 Ind. 84. *Ohio R. v. McClelland*, 25 Ill. 140. *Thorpe v. Rutland R.* 27 Vt. 140. If the duty is imposed by statute, the company cannot divest itself of responsibility by making private contracts with the landholders along the road, by which they agree to make and keep up the fences. *New Albany R. v. Maiden*, 12 Ind. 10. In *Housatonic R. v. Waterbury*, 23 Conn. 101, the plaintiff's farm had been cut in two parts by a railroad, and there was no way of getting from one part to the other except by crossing the railroad. *Held*, that the plaintiff had the right to cross the railroad with his cattle, but not to let the cattle loiter or pasture upon the track, and that this right of crossing must be reasonably exercised. See *White v. Concord R.* 10 Foster, 188. If a railroad company agrees to fence a piece of land, and does not fence it, it is liable for damages done to cattle which have strayed from the land on to the railroad. *Conger v. Chicago R.* 15 Ill. 366. It must, however, clearly appear that it was owing to the absence of the fence that the injury happened. *Joliet R. v. Jones*, 20 Ill. 221.

10. As to the Degree of Responsibility.

§ 568. We have already endeavored to show the difference in respect to the degree of responsibility between common carriers of

fully in a common highway, and from thence strays on to a railroad track, and is killed by the engine in passing, the railroad company is not liable to the owner of the animal, unless the injury was the result of the gross negligence of the engineer. *Waldron v. Rensselaer R. 8 Barb. 390. Moshier v. Utica R. 8 Barb. 427. See 13 Barb. 496.* (a) In the matter of *Long Isl. and Railroad*, 3 Edw. Ch. 487, it was held by Vice-Chancellor McCoun, that owners of land which adjoin a railroad cannot compel the railroad company to put up a fence along such road, nor require them to contribute thereto; there does not exist that mutuality of benefit between the company and the owners of the adjoining land which can compel such company to make or contribute to the making of fences; (b) and the Vice-Chancellor on the occasion remarks: "I am well satisfied, from the testimony of the witnesses, who speak from what they have seen and experienced on this and other railroads for a number of years, that it is not necessary that a railroad should

be fenced at the sides to insure the safety of persons and property in transit on the road against accidents from cattle getting thereon. Indeed, it is very clearly to be perceived that there is less danger of running over them when they do get upon the road, where there is no side fence to prevent their going off, than where there is such an obstruction." What are called "cattle guards" at each end are all that can be required. *Rensselaer & Saratoga Railroad*, 4 Paige, Ch. 553. The main question in a case in the Court of Appeals, of New York, was presented by the plaintiff's offer to prove that the defendants were guilty of negligence, and that by the exercise of ordinary care on their part the oxen alleged to have been killed would not have been. By the court, Hurlbut, J.: "Taking this as proved, the case stands thus: The defendants, in the rightful use of their railway, while propelling their engine with cars attached, and running at a low rate of speed, struck and killed the plaintiff's oxen, which had strayed on the track

(a) *Railroad Co. v. Skinner*, 19 Penn. State, 298. *North Pennsylvania R. v. Rehman*, 49 Penn. State, 101. *Drake v. Philadelphia R.* 51 Penn. State, 240. *Chicago R. v. Patchin*, 16 Ill. 198. *Louisville R. v. Ballard*, 2 Met. Ky. 177. *Terre Haute R. v. Augustus*, 21 Ill. 186. *Roberts v. Great Western R.* 4 C. B. (N. S.) 506. *Chicago R. v. Cauffman*, 28 Ill. 513. If there is gross negligence on the part of the company or its servants, the company is liable. *Pritchard v. La Crosse R.* 7 Wis. 232. In California an owner of cattle is not obliged to keep them in his close. *Waters v. Moss*, 12 Calif. 535. See *Richmond v. Sacramento R.* 18 Calif. 351. See also *Aycock v. Wilmington R.* 6 Jones, 231. *Montgomery v. Wilmington R.* 6 Jones, 464; *Laws v. North Carolina R.* 7 Jones, 468; *Alger v. Mississippi R.* 10 Iowa, 268. As to the rule of damages where the cattle are not killed, see *Illinois Central R. v. Finigan*, 21 Ill. 646.

(b) *Alton R. v. Baugh*, 14 Ill. 211. *Chicago R. v. Patchin*, 16 Ill. 198. *Railroad Co. v. Skinner*, 19 Penn. State, 298.

passengers and common carriers of goods; and, in so doing, it was stated to be well established that the former are not, like the latter,

of the railway and were trespassing at the time. The result might have been avoided by the exercise of ordinary care on the part of the defendants, whose negligence contributed to produce the injury complained of; and the question is, whether, under such circumstances, the plaintiff can maintain his action. It is obvious that the plaintiff would have received no injury if the oxen had not been on the track of the railway; and having been there without right, the law imputes a fault to the plaintiff. On the other hand, although the plaintiff was in fault, the injury would not have happened but for negligence and the want of ordinary care on the part of the defendants; and assuming this to be a fault on their part, the injury then would appear to have resulted from the common fault of both parties. But, if we were permitted to inquire as to the degree of blame which attached to each, we should be obliged to pronounce that the principal must be attributed to the plaintiff;” and he was not entitled to recover. *Munger v. Tonawanda* R. 4 Comst. 349. See the case *nom. Tonawanda R. v. Munger*, in 5 Denio, 255. If the cattle of a stranger be on the lands of another, adjoining a railroad, and from those

lands they pass on to the railroad through a gate left open by the proprietor of such lands, and are killed by the engine, their owner cannot recover their value, although the railroad company has not complied with a statute in respect to fences, at other points of the road. *Brooks v. New York R.* 13 Barb. 594. So, in another case, it was *held*, that, if a railroad company is bound to fence the entire track, yet, if a cow comes from a highway, or common, for want of fence, and is killed, the owner cannot recover, unless he proves affirmatively that the cow had a lawful right to be on the common by a town vote. *Perkins v. Eastern R.* 29 Maine, 307. (a) But in *Fawcett v. North Midland R.* 16 Q. B. 610; 2 Eng. L. & Eq. 289; where the act required the defendants to keep gates constantly closed at road-crossings, and the plaintiff’s horse leaped out of his enclosure into the highway, and passed on to the railroad, because the gate was open, it was *held* that he could not recover the value of the horse which was killed; and that the horse, as to the defendants, was lawfully in the highway. See *ante*, § 556, in relation to mutual negligence; and *ante*, § 561. (b) The Vermont Central Railroad Company

(a) In New Hampshire, a railroad company is not liable to the owners of land adjoining their road for damages committed on those lands by cattle wrongfully permitted by their owners to run at large in the highway, and thence escaping upon the railroad track, and from thence, through defects of the fences of the railroad, upon the lands of such adjoining owners. *Chapin v. Sullivan* R. 39 N. H. 53, 564.

(b) The 8 & 9 Vict. c. 20, § 68, enacts that a railway company shall make and maintain “for the accommodation of the owners and occupiers of lands adjoining the railway . . . sufficient fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or the occupiers thereof from straying thereout by reason of the railway.” In *Dawson v. Midland R. L. R.* 8 Ex. 8, the plaintiff hired of the occupier of some land adjoining a railway

insurers against all injuries, except by the act of God, or by the public enemy. It was moreover stated, that the nature of their

are obliged by law to erect and maintain such fences and cattle-guards upon their roads as will prevent horses and other animals from passing them. *Quimby v. Vermont R.* 23 Vt. 393. But it has been *held*, that under such

a stable for his horse. The horse was allowed to graze during the day on the land. One night it escaped from the stable on to the land and thence through a defective fence on to the railway. *Held*, that the plaintiff was entitled to the benefit of the act. In *Child v. Hearn*, L. R. 9 Ex. 176, pigs were *held* to be "cattle," within this statute. In Massachusetts a railroad corporation is obliged by statute to erect and maintain suitable fences upon both sides of the entire length of a railroad constructed subsequently to May 16, 1846. It has been *held* that this is only for the protection of the owners of the adjoining land. If, therefore, there is an insufficient fence through which cattle, which are unlawfully on the adjoining land, come upon the track, the statute does not apply. The cattle in such a case are trespassers, and the corporation is not liable unless the injury was caused by the wanton and reckless misconduct of its agents. It is not enough to show carelessness and want of reasonable care. *Maynard v. Boston & Maine R.* 115 Mass. 458; *McDonnell v. Pittsfield R.* 115 Mass. 564. See also *Eames v. Salem & Lowell R.* 98 Mass. 560; *Eames v. Boston & Worcester R.* 14 Allen, 151; *Eames v. Worcester & Nashua R.* 105 Mass. 193. The case of *Browne v. Providence R.* 12 Gray, 55, to the contrary, was decided under a statute of Connecticut. See also *Isbell v. New York & New Haven R.* 27 Conn. 393. In *Keliher v. Connecticut River R.* 107 Mass. 411, the defendant did not fence the line of its road in front of a culvert under the road bed; and did not construct any barrier to prevent cattle from entering the culvert. The depth of water was usually enough to prevent the escape of cattle from the land of the adjoining proprietor, at the unprotected place; but, on a day when the water was low, a cow, which he was pasturing there, passed through the culvert and over land of another person on the other side of it, and then entered upon the railroad at a place which was also defective for want of a suitable fence, and was there injured by a passing train. *Held*, that the defendant was liable. But in this case the cow was unlawfully on the adjoining lot through the fault of the defendant. See *McDonnell v. Pittsfield R.* 115 Mass. 564. See also *Corwin v. New York R.* 3 Kern. 42; *Murch v. New York R.* 29 Barb. 647; *Duffy v. New York R.* 2 Hilton, 496; *Sharrod v. London R.* 4 Exch. 587. And a railroad company, which is bound to erect and maintain a sufficient fence, is liable if a horse, feeding in an adjacent pasture, escapes through a defect in the fence and is injured by the cars, without proof of any care on the part of the owner to prevent such an escape, and evidence of notice to the owner that the horse had escaped several times before and had been on the track is immaterial. *Rogers v. Newburyport R.* 1 Allen, 16. See also *Norris v. Androscoggin R.* 39 Maine, 273, where it was *held* to be no defence to an action against a railroad for damages caused by the insufficiency of a fence, that

undertaking was to carry "safely and securely," and that although they did not thus impliedly warrant the safety of the

laws it is the duty of the owner of cattle, knowing an exposed situation of a railroad track, to exercise as much care and prudence in keeping his property from exposure to injuries therefrom as is required of the company in guarding against their commission; and if, in such case, he permits his cattle to run in the highway, knowing that there is no obstruction to their passing from thence upon a railroad track, he is guilty of the same degree of negligence as that with which the company are chargeable, in permitting their railroad to be thus exposed, and no action can be sustained. *Trow v. Vermont R.* 24 Vt. 487. (a) In a case in England, in the Court of Queen's Bench, it appeared that by an act of Parliament (5 & 6 Vict. c. 55), after reciting that experience had shown that it was more conducive to safety that gates

should be kept closed across the turnpike or other road, instead of across the railway, enacted, that "such gates should be kept constantly closed across each end of such turnpike or other roads in lieu (as formerly provided by 6 & 7 Wm. 4) of across the railroad, except during the time when horses, cattle, carts, or carriages passing along such turnpike or other road shall have to cross such railway." It being pleaded that certain horses were not lawfully on the highway, it was *held*, 1st, that the road formed by the company was a highway, though the parish might not be bound to repair it; and 2dly, that the defendants being required by their railway act to keep the gate at the crossings constantly closed, the horses were, as against the defendants, lawfully on the highway, and hence, the plaintiff was entitled to recover. *Fawcett v. York R.* 16

the plaintiff originally built the fence for the railroad in an insufficient manner. And in New Hampshire, a land-owner through whose farm a railroad runs may turn his cattle into his fields, and if they are injured by the railroad, he may recover, although he knew that the fences were insufficient. *Horn v. Atlantic R.* 35 N. H. 169. See also *Smith v. Eastern R.* 35 N. H. 356; *Chapin v. Sullivan R.* 39 N. H. 564; *Clark v. Vermont R.* 28 Vt. 103; *Holden v. Rutland R.* 30 Vt. 297; *Indianapolis R. v. Townsend*, 10 Ind. 38; *Whitney v. Atlantic R.* 44 Maine, 362; *Bulkley v. New York R.* 27 Conn. 479; *Chapman v. New York R.* 31 Barb. 399, 33 N. Y. 369; *New Albany R. v. Pace*, 13 Ind. 411; *Indianapolis R. v. Wharton*, 13 Ind. 509; *New Albany R. v. Aston*, 13 Ind. 545; *Gardner v. Smith*, 7 Mich. 410; *Galena R. v. Crawford*, 25 Ill. 529; *McCall v. Chamberlain*, 13 Wis. 637. In Maryland, the effect of the statutory regulations is to throw the burden of proof on the defendant, in an action against a railroad for injury to cattle. *Keech v. Baltimore R.* 17 Md. 32. In Iowa, a statute, providing that if a railroad corporation fails to fence its road against live-stock at all points where it has a right to fence, it shall be liable for all stock killed, does not apply to depot grounds. *Davis v. Burlington R.* 26 Iowa, 549. If trains are run under the direction and control of a railroad company, the company is liable for damage caused by an insufficient fence, although other persons receive the earnings of the road. *Wyman v. Penobscot R.* 46 Maine, 162.

(a) See *Woolson v. Northern R.* 19 N. H. 267; *Jackson v. Rutland R.* 25 Vt. 150; *Morse v. Rutland R.* 27 Vt. 49.

passengers at all events, yet they were bound to the "utmost" care and skill in the performance of their duty.¹ (a) The term here used expresses the idea of something beyond ordinary care, which the law considers the limit of liability to which carriers of goods for hire, who are not common carriers, are held.² The degree of their responsibility, therefore, to which carriers of passengers are subjected, is not ordinary care, which will make them liable only for ordinary neglect, but extraordinary care, which renders them liable for slight neglect.³ It is the danger to the public which may proceed even from slight faults, unskillfulness or negligence of passenger carriers or their servants, and the helpless state in which passengers by their conveyances are, which have induced both courts of law and juries, both in Eng-

Q. B. 610; 2 Eng. L. & Eq. 289. And see *Schofield v. Schunck*, Q. B. 1855, 30 Eng. L. & Eq. 233. Railroad corporations are not bound under an act of the legislature to make or keep fences, except against the land of persons adjoining the railroad; and it was held, that the railroad company was not liable for a beast killed which escaped from its pasture into an adjoining highway, which was crossed by a railroad, in land not owned by the plaintiff. *Towns v. Cheshire* R. 1 Foster, 363. The beast was wrongfully away from its pasture. *Cornwall v. Sullivan* R. 8 Foster, 161. And see *Jones v. Waltham*, 4 Cush.

499; *Perkins v. Eastern R.* 29 Maine, 307. In the State of New York, if a railroad company has failed to comply with the directions of the act of March 27, 1848, by which all railroad companies are required to erect and maintain fences, and to construct and maintain cattle-guards at all crossings, it is chargeable with negligence in such case, and responsible for the injury. *Waldron v. Rensselaer* R. 8 Barb. 390. (b)

¹ *Ante*, §§ 521-524.

² See *ante*, Chap. III.

³ See *Ingalls v. Bills*, 9 Met. 1; *Stokes v. Saltonstall*, 13 Pet. 181; and *ante*, § 523.

(a) *Sales v. Western Stage Co.* 4 Iowa, 547. *Edwards v. Lord*, 49 Maine, 279.

(b) See *Shepard v. Buffalo* R. 35 N. Y. 641. But this absolute liability has been held to cease if the railroad has constructed and maintains proper fences and cattle-guards. If the cattle-guard is filled with snow, and a cow thereby gets on to the track, the company is not liable for damage done to the cow if the owner of it is also guilty of negligence. *Hance v. Cayuga* R. 26 N. Y. 428. In Indiana, if the road is securely fenced on each side, and there are sufficient cattle-guards at the crossing, a railroad company is not liable for running over an animal on the highway, where the railroad is not guilty of negligence. *Lafayette R. v. Shriner*, 6 Ind. 141. *Northern Indiana R. v. Martin*, 10 Ind. 460. See *Indiana R. v. Gapen*, 10 Ind. 292; *Indianapolis R. v. Townsend*, 10 Ind. 38; *Madison R. v. Kane*, 11 Ind. 375; *New Albany R. v. McNamara*, 11 Ind. 543; *Indianapolis R. v. Snelling*, 16 Ind. 435.

land and in America, to bind the rule of the contract, *locatio operis*,¹ much tighter than they could be insisted for on the ordinary principles of that contract.² The most inconsiderable departure, therefore, from the important duties which in the preceding pages are laid down and explained, as duties imposed upon passenger carriers, will render them liable for the consequences.

§ 569. That the *onus probandi* is on the proprietor of the vehicle to establish that there has been no disregard whatever of his duties, and that the damage has resulted from a cause which human care and foresight could not prevent, is well settled.³ (a) As was laid down by the court, in *McKinney v. Neil*,⁴ the upsetting of a stage-coach is *prima facie* evidence of negligence; and a passenger who has been injured need show nothing more to sustain his action; and it will then be incumbent on the defendant to show, by way of reducing the damages, or in bar of the action, the circumstances of the case. In the Supreme Court of the United States, it was admitted that the carriage was upset, and the plaintiff's wife injured; and it was held incumbent on the defendant to prove that the driver was a person of competent skill and of good habits, and in every respect qualified for his business; and that he acted on the occasion in question with reasonable skill and with the utmost prudence and

¹ See *ante*, § 13.

² 1 Bell, Com. 372. Story on Bailm. § 601. 2 Kent, Com. 600. "They" (carriers of passengers) "are bound to the utmost care and diligence of very cautious persons; and of course they are responsible for any, even the slightest neglect." 2 Greenl. Ev. § 221. Passenger carriers, says Mr. Chief Justice Shaw, "are held to the strictest responsibility for care, vigilance, and skill, on the part of them-

selves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the responsibility upon those who can best guard against it." *Farwell v. Boston R.* 4 Met. 49.

³ *Ibid.* *Ingalls v. Bills*, *ub. sup.* *Ware v. Gay*, 11 Pick. 106. *Christie v. Griggs*, 2 Camp. 79.

⁴ *McKinney v. Neil*, 1 McLean, C. 540.

(a) If a lamp burst in an omnibus, the duty of proving that the fluid in the lamp was a safe and proper article is on the carrier. *Wilkie v. Bolster*, 3 E. D. Smith, 327. In *Bowen v. New York Central R.* 18 N. Y. 408, it is said that the general rule does not require such particular precautions as it is apparent, after the accident, might have prevented the injury, but such as would be dictated by the utmost care and prudence of a very cautious person before the accident, and without knowledge that it was about to occur.

caution; and that if the disaster was occasioned by the least negligence, or want of skill or prudence on his part, then the defendant was liable.¹ In a case where an accident happened to a passenger on a railroad, it was held to be *prima facie* evidence of negligence; and Lord Chief Justice Denman instructed the jury, that it having been shown that the exclusive management of the machinery and the railway was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced; which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give. The learned judge also adverted to the suggestion of a witness, that the speed was too great for the state of the rails at the spot, as furnishing one hypothesis that might account for the event.² (a) If a passenger by railroad permits his hand to extend

¹ Stokes v. Saltonstall, 13 Pet. 181. ² Carpue v. London R. 5 Q. B. 747.

(a) In *Le Barron v. East Boston Ferry Co.* 11 Allen, 312, this rule is *held* to be confined to the case where the nature of the accident affords some proof of the carrier's negligence. And in *Curtis v. Rochester R.* 18 N. Y. 534, it is *held*, that the fact that an accident has taken place raises a presumption of negligence on the part of a railroad, only when it appears that the accident resulted from a defect in the road or some part of the apparatus employed in operating it. In *Feital v. Middlesex R.* 109 Mass. 398, the only evidence of negligence was that a horse car went off the track. This was *held* sufficient *prima facie* evidence, and Colt, J., said: "A railroad and its cars are constructed and adjusted to each other with the purpose that, when there is no defect in either, the cars shall remain on the track. The fact that a car runs off is evidence of defect or negligence somewhere; and where the track and its cars are under the exclusive control of the defendants, it has been *held* evidence of negligence sufficient to charge them, in the absence of any explanation showing that the accident happened without fault on their part." See *Edgerton v. New York R.* 35 Barb. 193; *Brehm v. Great Western R.* 34 Barb. 256; *Dawson v. Manchester R.* 7 H. & N. (Am. ed.) 1037; *Hammack v. White*, 11 C. B. (N. S.) 594, per Erle, J.; *Great Western R. v. Braid*, 1 Moore, P. C. (N. S.) 116. *Welfare v. London R. L. R.* 4 Q. B. 693; *Kearney v. London R. L. R.* 5 Q. B. 411, L. R. 6 Q. B. 759; *Gee v. Metropolitan R. L. R.* 8 Q. B. 161; *Daniel v. Metropolitan R. L. R.* 3 C. P. 216, 591, L. R. 5 H. L. 45. In *Simson v. London Omnibus Co. L. R.* 8 C. P. 390, a passenger in an omnibus was injured by one of the horses kicking through the front panel. There was no evidence that the horse was a kicker, but it was proved that the panel bore the marks of other kicks, and that no precaution had been taken, by the use of a kicking strap or otherwise, against the possible consequence of a horse

outside of the window of the car, whereby his arm is broken in passing a bridge, the carrier is not liable for the injury; though, if the place of accident is one of unusual danger, it is the duty of the carrier, or his servants, to give warning.¹ (a)

§ 570. But, as there has been occasion before to say, passenger carriers, not being insurers, are not responsible for injuries from accidents where the utmost skill and diligence have been employed; and on this point we would again refer the reader to the case of *Ingalls v. Bills*.² Accidents may happen, notwithstanding the utmost care and diligence are exercised to prevent them. The lights, which it is the duty of passenger carriers to have on a dark night, may be obscured by fog; the horses may be frightened without the fault of the driver, as by the sudden firing of a gun; or the driver may be deceived by the sudden alteration of objects

¹ *Laing v. Colder*, 8 Barr, 479.

² *Ingalls v. Bills*, 9 Met. 1, and cited *ante*, § 536.

kicking. The defendant offered no evidence. *Held*, that there was evidence of negligence on the part of the defendants to be submitted to the jury. Bovill, C. J.: "It is quite true that the defendants do not absolutely warrant the safety of their passengers, or the absolute fitness of their carriages and horses; but they are only bound to use reasonable care to provide for the passengers' safety. It is also true that the mere fact of the happening of an accident is not, as a general rule, even *prima facie* evidence of negligence. But if the cause of the accident be shown, it may or may not, according to the circumstances, be evidence for the jury." In *Ayles v. South Eastern R. L. R.* 3 Ex. 146, the plaintiff was in a train, then stationary, as a passenger on the defendant railway, and was injured by another train running into the train he was on. The train in motion was in fault. Several companies had running powers over the part of the line where the collision occurred, and no evidence was given as to whether the moving train belonged to, or was under the control of the defendant. *Held*, that, in the absence of evidence to the contrary, it must be presumed that the train causing the accident belonged to, or was under the control of the defendant. In *Railroad Co. v. Pollard*, 22 Wall. 341, a passenger standing up in a car just as the train was about to stop at a station was injured by being thrown down by the force with which the cars came together on stopping. *Held*, that there was evidence of the defendants' negligence sufficient to go to the jury.

(a) See *Todd v. Old Colony R.* 3 Allen, 18, 7 Allen, 207. This case holds the passenger guilty of negligence as a matter of law, in putting his arm out of the window of a car in motion. See also *Louisville R. v. Sickings*, 5 Bush, 1. But in *New Jersey R. v. Kennard*, 21 Penn. State, 203, the question of negligence was *held* to be one for the jury in such a case. This case has been overruled in *Pittsburgh R. v. McClury*, 56 Penn. State, 294. See *ante*, § 559.

on the way; or an unexpected obstruction may be encountered; or, the driver, from the intense severity of the cold, may, at the time of unexpected danger, become physically incapable of managing his horses, or of otherwise doing his duty. These, and the like cases, are such as will exonerate the proprietors of the vehicle.¹ If a driver of a stage-coach imprudently attempts to pass another on the road, and it appears that the latter did not say or do any thing to provoke a reckless competition, and, on the contrary, sought to avoid it, and did all that a prudent and skilful driver could do to avoid the consequences of the recklessness of the former, he is not liable, however serious the consequences may have been to his passengers.² (a)

11. Their Duties and Liabilities in respect to Baggage.

§ 571. This is a subject which has already been fully considered and illustrated by the aid of adjudged cases, in the preceding portions of our work, to which it more properly belongs, as constituting the law of the duties and responsibilities of common carriers of goods; and to which we would refer the reader; and the general rules of law on the subject we shall here only summarily recapitulate. Public passenger carriers are bound not only to receive as passengers all persons who offer themselves as such, but, like common carriers of goods unattended by the owner, they are bound to receive the articles which the traveller has with him, and which constitute his baggage or luggage.³ We have already seen, that common carriers of passengers, in so far as regards the baggage or luggage delivered to them by a traveller, are liable to the same extent as common carriers of goods and merchandise;⁴ that is, they insure baggage against all losses, whether proceeding from the negligence or misconduct of themselves, their servants, or even all third persons, with

¹ Story on Bailm. § 602.

ject treated at large, *ante*, Chap. V.

² By the court, in its charge to the jury in *Peck v. Neil*, 3 McLean, C. C. 22; *Monroe v. Leach*, 7 Met. 274.

and *ante*, § 524 *et seq.*

⁴ See the subject fully considered in Chap. IV. § 107 *et seq.*, and Chap.

³ As to the duty of common carriers to receive baggage, see the sub-

VIII. § 317 *et seq.*

(a) In an action for an injury caused by the alleged unskilful driving of a person, it has been held that evidence of similar negligent acts on his part, at other times, is not admissible. *Maguire v. Middlesex R.* 115 Mass. 239.

the exception of the owner. The only mode, in short, by which they can exonerate themselves from liability in case the baggage of a passenger is lost, is by showing that the loss was occasioned by the act of God or the public enemy,¹ or by the negligence of the owner himself after he has assumed the custody, or direction of it.² A public notice that "all baggage is at the risk of the owner" will not have this effect.³ At the termination of the route of a stage-coach, railroad, or steamboat, the conductors thereof are also bound to make a proper delivery of the baggage to the true owner of it; a duty by no means difficult, as it requires but ordinary care in marking the baggage or luggage, entering it on the way-bill, and delivering a check to the owner.⁴ The mere fact, we have seen, that goods in the form of merchandise, transported by a common carrier of them, have arrived at their place of destination in safety, is no discharge of the carrier from his responsibility until they are delivered to the owner, even if he be not ready at once to receive it; for he is under obligation to keep it for a reasonable time, although, if it is not called for in a reasonable time, his liability as a common carrier will be reduced to that of an ordinary bailee. The same rule applies in respect to the delivery of articles in the form of, and composing the baggage of a traveller.⁵ Like a common carrier of goods, a passenger carrier is also liable, as we have seen, for a misdelivery of baggage, although it is delivered to a wrong person by mistake, and with no fraudulent intent.⁶ The responsibility of the carrier for the safety of the baggage commences, of course, with a delivery of it to him, and a delivery at his office or to an agent is a delivery to him. These general rules have been already laid down, and, as we have said, more fully illustrated, in preceding portions of the work, which have been referred to in the notes below.⁷

§ 571 *a*. But the liability of passenger carriers for the loss of baggage, being equal to that of common carriers of goods, supposes that the company do not protect themselves as to the

¹ *Ante*, Chap. VI.

² *Ante*, §§ 113, 140.

³ See *ante*, § 238 *et seq.*

⁴ Story on Bailm. § 595. And see the subject of the proper delivery

of baggage fully considered, *ante*, §§ 317-325.

⁵ *Ante*, §§ 283-294.

⁶ *Ante*, §§ 321-327, 432.

⁷ And see the Index, tit. "Baggage."

baggage of the traveller by some special contract on the subject. Some of the railway companies in England have regulations limiting their liabilities in regard to passengers' luggage, the purport of such regulations being, "that the charge made for passengers does not extend to luggage, and that the company will not be answerable for luggage, unless booked and paid for. Such a regulation (and a carrier has a right to make all reasonable regulations¹) may be reasonable where the practice of booking luggage is really carried out, and proper facilities are afforded to the public for complying with it. Railway companies, and coach proprietors and other carriers, may refuse to take charge of luggage unless booked and given over to their servants in conformity with the general rules which they have found it necessary to establish for conveniently conducting their business. But the case is different when, as frequently happens, the regulation respecting booking is a dead letter, and the general practice is to take charge of passengers' luggage without requiring it to be booked. In this case the regulation is nothing but a notice, the legal effect of which is, to say the least, very doubtful,² and which, if the directors think it advisable to issue, they ought to issue as a notice. Issued as a mere notice, such regulation can have no further effect in limiting the company's liability, than that they may refuse to take charge of passengers' luggage, unless such reasonable regulations as they have found it necessary for their convenience to establish are complied with. If they do actually take charge of such luggage, they incur the ordinary responsibility of common carriers.³ But it would appear, that, where the company take care to embody the notice in the tickets delivered to every passenger on taking his place, as part of the terms on which they are willing to accept him, this would constitute a special contract on the subject, so that the company would only be liable for negligence.⁴

¹ *Ante*, §§ 125, 245, 525 *et seq.*

² *Ante*, § 238 *et seq.*

³ Report of the Officers of the Railway Department of the Board of Trade, cited in Walford, Sum. of the Law of Railways, p. 326. See *ante*, §§ 107-117, 238.

⁴ See *Palmer v. Grand Junction R.* 4 M. & W. 752. And see, as to the

effect of a special contract, *ante*, § 225. A railway company may also be entitled to a protection more or less extensive in regard of the luggage of passengers, under the provisions of their own act of incorporation; as, for instance, where a railway act provided that the company should not be responsible for any thing taken with

12. Their Liability for the Acts of their Servants and Agents.

§ 572. We have seen that passenger carriers are not only personally bound for their own acts and omissions in the transportation of travellers and their baggage, but also for the misconduct and negligence of the agents in their employ.¹ (a) A declaration which charges the defendant with having negligently driven his cart against the plaintiff's horse is supported by evidence that the defendant's servant drove the cart.² A charge, that the defendant is the owner of the vehicle, is supported by

him, by a passenger, save articles of clothing of given weight and dimensions. Under a provision of the above kind, the company are exempt from all liability, in respect of goods accompanying a passenger, not being articles of clothing of the requisite weight and dimensions; that is to say, from all liability as carriers; for the

clause of course is not a license for the company to deal with such articles at their own free will and pleasure. See *Elwell v. Grand Junction R.* 5 M. & W. 669; and *ante*, §§ 250, 267 *et seq.*

¹ And see *Philadelphia R. v. Derby*, 14 How. 468.

² *Brucker v. Fromont*, 6 T. R. 659.

(a) *Moore v. Fitchburg R.* 4 Gray, 465. The carrier is liable for the wilful act of his servant if committed in the course of his employment. *Philadelphia R. v. Derby*, 14 How. 468. *Weed v. Panama R.* 5 Duer, 193. *Meyer v. Second Avenue R.* 8 Bosw. 305. See *Crocker v. New London R.* 24 Conn. 249; *Illinois Central R. v. Downey*, 18 Ill. 259; *Chapman v. New York R.* 33 N. Y. 369; *Howe v. Newmarch*, 12 Allen, 49; *Holmes v. Wakefield*, 12 Allen, 580. In *Ramsden v. Boston & Albany R.* 104 Mass. 117, a railroad corporation was held responsible for an assault and battery by the conductor of one of its trains upon a passenger in seizing or attempting to seize his property to enforce payment of his fare. In England, the rule appears to be more restricted, and a corporation has been held not to be liable for the acts of its servants in some cases where it would probably be held liable in this country. See *Allen v. London R. L. R.* 6 Q. B. 65; *Goff v. Great Northern R.* 3 E. & E. 672; *Moore v. Metropolitan R. L. R.* 8 Q. B. 36; *Edwards v. London R. L. R.* 5 C. P. 445; *Bayley v. Manchester R. L. R.* 7 C. P. 415, affirmed, L. R. 8 C. P. 148. In *Tebbutt v. Bristol R. L. R.* 6 Q. B. 73, the stations of the defendant and of two other railways adjoined and were open to one another, and the passengers of the three companies were in the habit of passing directly from one to the other, the whole area being used as common ground. While the plaintiff was standing in the station of the defendant, on his way from the station of one of the companies to that of the other, a porter of the defendant negligently drove a truck laden with luggage, and a trunk fell off and injured the plaintiff. Held, that the defendant was liable. See *Seymour v. Greenwood*, 7 H. & N. 355; *Limpus v. London Omnibus Co.* 1 H. & C. 526; *Poulton v. London R. L. R.* 2 Q. B. 534.

evidence that he holds himself out to the world as the owner of it, by suffering his name to remain printed on it, and over the door of the house of business to which it belongs; although it is proved, that he had for some days ceased to be the owner of the vehicle, and was not concerned in the business, having relinquished his business to a former partner.¹

§ 573. If a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not liable, because he has not, in such case, intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer to say that the servant acted improperly in the management of it; but the master, in such case, will be liable, because he has put it in the servant's power to mismanage the carriage, by intrusting him with it. Therefore, where a servant, having set his master down in Stamford Street, was directed by him to put up in Castle Street, but instead of so doing went to deliver a parcel of his own in another part of London, and in returning drove the carriage against an old woman and injured her; it was held, that the master was responsible for his servant's act.²

§ 574. It is laid down by Blackstone, that if a servant by his negligence does any damage to a stranger, the master shall be answerable; but the damage must be done while he is actually employed in his master's service; otherwise the servant shall answer for his own misbehavior.³ The question therefore is, in case of an injury done to the person of a passenger, — who employed the person who did the injury?⁴ Any arrangement, we have seen, made between common carriers of goods and their servants or agents, whereby the latter are exclusively to receive the compensation for the conveyance, will not exempt the car-

¹ *Stables v. Eley*, 1 Car. & P. 614.

² *Sleath v. Wilson*, 9 Car. & P. 607.

³ 1 Bl. Com. 431, and see *ante*, §§ 513, 517. A driver sent by the owner of a carriage is his servant, and unless the hirer causes the driver to go beyond the contract of hiring, he will not be liable for the acts of the driver occasioning injury to the carriage or

horses. *Hughes v. Boyer*, 9 Watts, 556.

⁴ *Milligan v. Wedge*, 12 A. & E. 737. *Rapson v. Cubitt*, 9 M. & W. 710, is an authority to show that the party injured by the negligence of another cannot go beyond the party who did the injury; unless he can establish that the latter stood in the relation of a servant to the party sued.

riers from responsibility; unless such arrangement was known by the owner of the goods, and he contracts exclusively with the servants and agents.¹

§ 575. There was an important question as to the liability of a master for the acts of his driver, in *Laugher v. Pointer*,² in which, there being a difference of opinion on the bench, the case was directed to be argued before the twelve judges. The question was, whether, where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person, the owner of the carriage was liable to be sued for such injury.³ (a) The owner of the carriage would have been liable if

¹ See *ante*, §§ 77, 85.

² *Laugher v. Pointer*, 5 B. & C. 547.

³ Held by Abbott, C. J., and Littledale, J., that the owner of the carriage was not liable to be sued for such injury, Bayley and Holroyd, JJ., dissenting. "The able judgments on both sides have," observes Judge Story, "exhausted the whole learning on the subject, and should, on that account, be attentively studied." Story on Agency, p. 406. They were considered fully by the court in *Quarman v. Burnett*, 6 M. & W. 499, and the court considered the weight of authority in favor of the view taken by Abbott, C. J., and by Littledale, J. The question in *Quarman v. Burnett*, *ub. sup.*,

was treated as similar in its circumstances to the one in *Laugher v. Pointer*, *ub. sup.*, and it was decided in favor of the defendant. In the Court of Queen's Bench, in *Milligan v. Wedge*, 12 A. & E. 737, Lord Denman, C. J., said: "I think we are bound by the late decision in *Quarman v. Burnett*, which was pronounced after full consideration." The case before the learned judge was this: The buyer of a bullock employed a licensed drover to drive it from Smithfield. By the by-laws of London, no one but a licensed drover could be so employed. The drover employed a boy to drive the bullock (together with others, the property of different per-

(a) See *Hilliard v. Richardson*, 3 Gray, 349. The owners of a vessel are not liable for damages occasioned by the negligence of stevedores employed for a gross sum by the consignees of the charterers in unloading the cargo. *Linton v. Smith*, 8 Gray, 147. In *Dalyell v. Tyrer*, Ellis, B. & E. 899, the lessee of a ferry hired from the defendants, for one day, a steam-tug and crew. The crew were paid by the defendants. Held, that the defendants were liable to a passenger on the ferry-boat for an injury sustained by reason of the negligence of the crew. See *Rauch v. Lloyd*, 31 Penn. State, 358. Where a contractor engaged in ballasting a railroad left stone so near the road that it rolled upon it, it was held that the company was liable for an injury sustained by a passenger in consequence thereof. *Virginia R. v. Sanger*, 15 Grat. 230. But see *Daniel v. Metropolitan R. L. R.* 3 C. P. 216, 591, L. R. 5 H. L. 45, where a passenger was injured by the fall of a girder which a third person was placing over the line of the defendant.

he had at all participated in the negligence of the driver, or the circumstances were such that it could be legally so considered. Thus, in an action against three persons for a joint trespass in killing a horse, by carelessly driving against him in the highway, and it appeared that one of the defendants lent the wagon to the others and then rode with them by invitation and after the accident acted as one of the party jointly concerned; it was held that he was equally liable with the others and was not to be regarded as a mere passenger.¹

sons) to the owner's slaughter-house. Mischief was occasioned by the bullcock, through the carelessness of the boy; and it was *held*, that the owner was not liable for the injury; the boy not being, in point of law, his servant. "The true test," said Coleridge, J., "is to ascertain the relation between the party charged and the party actually doing the injury. Unless the relation of master and servant exist between them, the act of one creates no liability in the other. Apply that here. I make no distinction between the licensed drover and the boy. Suppose the drover to have committed the injury himself. The thing done is the driving. The owner makes a contract with the drover that he shall drive the beast, and leaves it under his charge; and then the driver does the act. The relation, therefore, of master and servant does not exist between them." By Littledale, J.: "I gave my opinion so fully in *Laugher v. Pointer*, which has since been confirmed by the Court of Exchequer, in *Quarman v. Burnett*, I need say no more now, than that I retain the opinion." It appears that the liability of any one, other than the party committing the wrongful act, rests upon the principle *qui facit per alium facit per se*. In the case of a person riding in his own carriage, with a coachman and horses hired for a day, when the accident complained of took place (as in *Laugher v. Pointer*, *supra*), the livery stable-keeper alone stood in the

relation of master to the wrong-doer. It was he who had selected the coachman, and the fitness of the servant for his employment was matter of discretion for him. For its exercise he was responsible; of course, had he deputed the exercise of that discretion to another, he would have been equally responsible. But the proposition is clear, no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act is the act of another; and consequently a third person entering into a contract with the master, which does not raise the relation of master and servant cannot thereby be rendered liable. I fell from Littledale, J., in *Laugher v. Pointer*, that the law does not recognize a several liability, in two principals who are unconnected; if they are jointly liable, you may sue either but you cannot have two separately liable. This doctrine is one of general application, irrespective of the nature of the employment. The decision in *Reedie v. London* R. 4 Exch. 244, is an important corollary to both the cases of *Laugher v. Pointer*, and *Quarman v. Burnett*, upon the subject of the liability of a person for injuries occasioned by the negligence of another when employed on his behalf. See Lond. Law Mag. for February 1850, p. 105, and Law Rep. for April 1850, pp. 626, 634. See *post*, § 667

¹ *Bishop v. Ely*, 9 Johns. 294.

§ 576. On the principle which has already been considered, viz., that a plaintiff suing for negligence must himself be without fault, and must not himself have contributed to the injury caused in part by the defendant's negligence,—if several servants are engaged at the same work, and one of them is injured by the fault of negligence in which all participated, the master being absent at the time, the servant injured cannot recover of the master for the injury; although the act complained of was done under the superintendence of a foreman appointed by the master.¹(a)

§ 577. In the above case the negligent act was as much the fault of the plaintiff as of the defendant or his foreman; but suppose the case, that one of the servants employed by a master is injured by the negligent act of another servant in the same employment, and was himself free from all fault, and was, in no sense, a party to the negligence by which he was injured. It was admitted, in 1837, that there had been no precedent in England² for an action by a servant against his master, for any injury received by the former in the regular course of the latter's employment. The case in Massachusetts, decided in 1842,³ presented the following case, where two persons were in the service of one railroad company, whose business was to employ their trains of cars for the transportation of persons and goods for hire; and the two servants were employed for the performance of separate duties, but all tending to one and the same purpose, that of a safe and expeditious transmission of the trains; and the question was directly raised, whether for damages sustained by one of the persons so employed, exclusively by means of the negligence of the other, the party injured had a remedy against the common employer. Mr. Chief Justice Shaw pronounced the action "one of

¹ *Brown v. Maxwell*, 6 Hill, 592. ³ *Farwell v. Boston R.* 4 Met. 49.

² *Priestly v. Fowler*, 3 M. & W. 1.

(a) See *Senior v. Ward*, 1 Ellis & E. 385. In *Degg v. Midland R.* 6 H. & N. 773, this principle was applied to a person who was injured by the negligence of the servants of a railway company, while voluntarily assisting their fellow-servants in turning a turn-table. But in *Wright v. London R. L. R.* 10 Q. B. 298, where the plaintiff, the owner of a heifer, while assisting the servant of a railway company in shunting the car in which the heifer was to a siding, in order to expedite the delivery, was injured through the negligence of other servants of the railway, it was held that he was not a mere volunteer, and that he might maintain an action. Affirmed, 1 Q. B. D. 252.

new impression in our courts ;” and he considered it an argument against such an action, though not a decisive one, that “no such action had before been maintained.” The case was this: A railroad company employed A, who was careful and trusty in his general character, to tend the switches on their road ; and after he had been long in their service they employed B to run the passenger train of cars on the road, B knowing the employment and character of A. The company, it was held, were not answerable to B for an injury received by him while running the cars, in consequence of the carelessness of A in the management of the switches. The learned judge, in giving the opinion of the court, said: That where several persons were employed in the conduct of one common enterprise or undertaking and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other.. Regarding the case in this light, he considered it the ordinary case of one sustaining an injury in the course of his own employment; in which he must bear the loss himself. And the learned judge maintained that the responsibility which one is under for the negligence of his servant in the conduct of his business, towards third persons, is founded upon another and distinct principle from that of implied contract, and stands upon its own reasons of policy ; and the same reasons of policy limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency also forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employers for an indemnity which was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good. That persons are not to be responsible in all cases for the negligence of those employed by them, the learned judge relied upon the decisions which have established that underwriters cannot excuse themselves from payment of loss by one of the perils insured

against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties, as navigators,¹ although they are employed and paid by the owners.² (a)

¹ See *Copeland v. New England Ins. Co.* 2 Met. 440.

² On account of the novelty of the question and of the importance of the principle involved, we here insert the concluding portion of the learned judge's opinion. "In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say, that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing

agent, in case of an incorporated company, are questions on which we give no opinion. In the present case, the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is, that that person was chargeable with negligence in not changing the switch in the particular instance, by means of which the accident occurred by which the plaintiff sustained a severe loss. It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained."

(a) The doctrine of *Farwell v. Boston R.* has been followed in *Hayes v. Western R.* 3 Cush. 270; *Durgin v. Munson*, 9 Allen, 396. See *Seaver v. Boston R.* 14 Gray, 466; *Snow v. Housatonic R.* 8 Allen, 441; *Cayzer v. Taylor*, 10 Gray, 274. If the wife of an employee of a railroad is injured, while a passenger on the road, through the negligence of a fellow-servant of the husband, the latter can maintain an action against the railroad for the consequential damages sustained by him. *Gannon v. Housatonic R.* 112 Mass. 234.

§ 578. The Supreme Court of New York have expressed their approbation of the decision of the case just considered ; (a) and the principle contended for by the learned Chief Justice therein, is supported by *Murray v. South Carolina Railroad Company*,¹ and by *Priestly v. Fowler*, before referred to in the English Court of Exchequer.² The latter case goes further even than that of the case in Massachusetts, inasmuch as it decides that an employer would not be responsible to his servant for injury arising from an improper condition of the vehicle, with the management of which the servant was intrusted. The declaration in this case stated that the plaintiff was a servant of the defendant ; that the defendant had desired and directed the plaintiff, so being his servant, to go with certain goods of the defendant in his, the defendant's van, then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey ; that the plaintiff, in pursuance of such direction, proceeded and was carried by the said van with the said goods ; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded ; nevertheless, that the defendant did not use proper care that the van should not be overloaded ; in consequence of the neglect of which duty the van broke down, and the plaintiff was thrown on the ground, whereby his thigh was fractured. It was held that the action was not maintainable. As it was admitted that there was no precedent for the action, the court considered it incumbent upon them to decide the question which was presented upon general principles ; and, in so doing, they thought they were at liberty to look at the consequences of a decision the one way or the other. The consequence of holding the master liable, in their opinion, would be serious in the extreme. If, said the court, the owner of the carriage was liable to his servant for the

¹ *Murray v. South Carolina R.* 1 ² *Priestly v. Fowler*, 3 M. & W. 1.
McMullen, 385.

(a) *Coon v. Syracuse R.* 6 Barb. 231, affirmed 1 Seld. 492. *Russell v. Hudson River R.* 17 N. Y. 134. Where a railroad company allows another company to run trains over its track, the engineer of the latter is not considered as a fellow-servant of the switch tender of the former, and if the engineer is injured by the negligence of the switch tender, the first company is liable. *Smith v. New York R.* 19 N. Y. 137. See also *Warburton v. Great Western R. L. R.* 2 Ex. 30 ; *Catawissa R. v. Armstrong*, 49 Penn. State, 186.

sufficiency of the carriage, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman. Nor was there any reason, in the opinion of the court, why the principle should not, if applicable to this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins. The inconvenience, not to say the absurdity, of these consequences, afforded, in the opinion of the court, a sufficient argument against the application of the principle which was contended for. The servant is not bound to risk his safety in the service of his master; and in fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him; and which diligence and caution are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.¹ (a)

¹ In *Hutchinson v. York* R. 5 the time of his death, and that the Exch. 343, the defendants pleaded that accident was caused by the negligence the deceased was in their service at of a fellow-servant. The court, on

(a) In *Gillenwater v. Madison* R. 5 Ind. 339, a carpenter employed to build a bridge for the defendant company was ordered to go in the defendants' cars to a place and assist in loading timbers for the bridge, and while in the cars was injured by the fault of those in charge of the train. *Held*, that the railroad company was liable for the injury, the duties of the plaintiff not being common to, nor in the same department with, those of the servants of the company whose neglect was the cause of the injury. See also *Fitzpatrick v.*

§ 578 *a*. The plaintiff was a guard in the service of the defendants, a railway company, and his duty was to attach certain

demurrer, *held*, that the plea was good, as it constituted a complete answer to the action, by setting out that the deceased's death was caused by the negligence of a fellow-servant, and in accordance with the decision in *Priestly v. Fowler*, and the demurrer was overruled. But in Ohio there

New Albany R. 7 Ind. 436; Indianapolis R. *v. Love*, 10 Ind. 554; Indianapolis R. *v. Klein*, 11 Ind. 38; O'Donnell *v. Alleghany* R. 59 Penn. State, 239. The rule that a principal is not liable to one servant for the act of another does not apply where the principal is himself in fault; and where a railroad company uses a defective engine, knowing its condition, it is liable to one of its servants injured in consequence of such defect. *Keegan v. Western* R. 4 Seld. 175. See also *Snow v. Housatonic* R. 8 Allen, 441; *Cayzer v. Taylor*, 10 Gray, 274. The law may now be considered as well settled, that, where one servant is injured by the negligence of another, "it is immaterial whether he who causes and he who sustains the injury are or are not engaged in the same or in similar labor, or in positions of equal grade and authority. If they are acting together under one master in carrying out a common object, they are fellow-servants. The master, indeed, is bound to use ordinary care in providing suitable structures, engines, tools, and apparatus, and in selecting proper servants, and is liable to other servants in the same employment if they are injured by his own neglect of duty." Per Gray, J., *Gilman v. Eastern* R. 10 Allen, 236. See also *Ford v. Fitchburg* R. 110 Mass. 240; *Ladd v. New Bedford* R. 119 Mass. 412; *Hodgkins v. Eastern* R. 119 Mass. 419; *Bartonshill Coal Co. v. Reid*, 3 Macq. 272, 287; *Ormond v. Holland*, Ellis, B. & E. 102; *Weems v. Mathieson*, 4 Macq. 215; *Tarrant v. Webb*, 18 C. B. 797; *Clarke v. Holmes*, 7 H. & N. 937, 6 H. & N. 349; *Wright v. New York* R. 28 Barb. 80; *Moss v. Johnson*, 22 Ill. 633; *Searle v. Lindsay*, 11 C. B. (N. S.) 429; *Morgan v. Vale of Neath* R. L. R. 1 Q. B. 149; *Tunney v. Midland* R. L. R. 1 C. P. 291; *Feltham v. England*, L. R. 2 Q. B. 33; *Wigmore v. Jay*, 5 Exch. 354; *Ryan v. Cumberland Valley* R. 23 Penn. State, 384; *Bartonshill Coal Co. v. McGuire*, 3 Macq. 300.

In *Packet Co. v. McCue*, 17 Wall. 508, a laborer on a wharf was employed to assist in loading a vessel. When he got through his work, he was told to go to the office on the vessel and get his pay. He did so, and while going ashore was injured by the servants of the vessel recklessly pulling the gangway plank from under his feet. *Held*, that whether the relationship of master and servant had ceased between him and the owners of the vessel was properly left to the jury, although the facts of the case were not in dispute.

In *Railroad Co. v. Fort*, 17 Wall. 553, the plaintiff was a workman in a machine shop, and was injured while obeying an order of the superintendent. The jury found that the order was not within the scope of the plaintiff's duty and employment, but was within the superintendent's. *Held*, that the doctrine of fellow-workmen did not apply. See *Ashworth v. Stanwix*, 3 Ell. & Ell. 701.

carriages to the engine of a freight train, and to despatch the same within a certain time, so as to avoid collision with a passenger train. In consequence of the plaintiff's not having had another person to assist him, the engine started, threw him upon the rails, and a truck passed over his arm. The plaintiff for three months previously had done the same work without any assistant, and without making any objection. It was held, in an action by the plaintiff against the defendants, for compensation for the injury, that the plaintiff, having voluntarily undertaken the duty, was not entitled to recover.¹

§ 579. Although, where a party becomes responsible to the public by undertaking a public duty, he is liable to an action, and may, like a carrier, be sued in case or assumpsit, even if the injury has arisen from the negligence of his servant or agent; yet a party who has not been privy to a contract entered into with him can maintain no action upon it. A coach-maker may be liable for a defect in a carriage to the person to whom he sells it, but he is not liable to a passenger who has received injury in consequence of such defect; nor to the driver of it who receives an injury in consequence of its being defective; and as the driver cannot sue the maker of the coach, nor the person who employs him to drive it, he is remediless altogether.² In this case, A contracted with the Postmaster-General to provide a mail-coach to convey mail-bags along a certain line of road; and B and others also contracted to horse the coach along the same line;

has been in a case precisely like the case of *Farwell v. Boston R.* a refusal to apply the principle upon which that and the case of *Priestly v. Fowler* were decided. *Little Miami R. v. Stevens*, 20 Ohio, 415. (a)

This case is not like the case of *Priestly v. Fowler*, just above considered, and the other cases considered in connection with it.

² See the opinion of Lord Abinger, in *Winterbottom v. Wright*, 10 M. &

¹ *Skipp v. Eastern Counties R.* 9 Exch. 223, 24 Eng. L. & Eq. 396. W. 109.

(a) Affirmed in *Cleveland R. v. Keary*, 3 Ohio State, 201. In *Whaalan v. Mad River R.* 8 Ohio State, 249, the rule is stated to be that the master is not liable to one servant for injuries received from the negligence of a fellow-servant, where no relation of subordination or subjection exists between them, while engaged in the business of their common employer. A person repairing the track and a hand on the engine were held to be fellow-servants within this rule. The English doctrine has also been repudiated in Scotland. *Dixon v. Rankin*, 14 Court of Session Cases, 420.

and B and his co-contractors hired C to drive the coach. It was held that C could not maintain an action against A for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction; and the judges were unanimously of this opinion. The opinion of Baron Rolfe was as follows: "The breach of the defendant's duty, stated in the declaration, is his omission to keep the carriage in a safe condition; and when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach, and during all the time aforesaid it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition. The duty, therefore, is shown to have arisen solely from the contract; and the fallacy consists in the use of that word 'duty.' If a duty to the Postmaster-General be meant, that is true; but if a duty to the plaintiff be intended, and in that sense the word is evidently used, there was none. This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuria*; it is no doubt a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law." (a)

§ 579 a. After a railroad company has been incorporated, and an accident has occurred to a passenger on the line in consequence of the negligence of a servant of the company, neither the engine-driver nor the superintendent of the traffic has implied authority to contract with medical men to assist the injured person. Such authority may only be inferred from the conduct of the directors on former occasions, in recognizing similar contracts made by their officers; or perhaps from evidence that

(a) See also *Murch v. Concord R.* 9 Foster, 9. A railroad company which receives on its track the cars of another company, placing them under the control of its agents, and drawing them by its locomotive over its own road, assumes towards the passengers coming upon its road in such cars the relation of common carriers. *Schopman v. Boston R.* 9 Cush. 24.

similar powers were usually exercised by similar agents of similar companies.¹ (a)

13. Their Liability as Copartners.

§ 580. That one partner is liable in tort for the acts of his copartner, in the prosecution of the copartnership business, as well as upon contracts, is well settled.² And, as an action lies against a master for an injury done to another, through the negligence or unskillfulness of his servant, while acting in his employment, so partners are responsible in the same way for the conduct of their servant.³ The material question is, when is a carrier copartnership constituted? a question which is to be of course determined in reference to the well-established principle of law, that whoever participates in the profits of a trade or business, or has a specific interest in the profits themselves, as such, becomes chargeable as a partner with respect to third persons. Individuals become liable as partners to third persons, either by contracting the legal relation of partners *inter se*, or by holding themselves out to the world as partners; and, to speak correctly, these are the only means of incurring the liability in question.⁴ The partnership as to third persons may arise without the intention of the parties thereto, but by mere operation of law; but only the actual intention will constitute a partnership *inter se*.⁵ It seems that a party connected with a partnership, who receives a compensation for his services graduated by the profits of the business, is not a partner as to third persons; to constitute him such he must have such an interest in the profits as will entitle him to an account, and give him a specific lien or preference in payment over other creditors.⁶

¹ Cox v. Midland Counties R. 3 Exch. 268.

² See opinion of Walworth, Chancellor, in Champion v. Bostwick, 18 Wend. 175, and also *ante*, §§ 92-95.

³ Dwight v. Brewster, 1 Pick. 50.

⁴ Gow on Part. 14, 15. Collyer on Part. (3d Am. ed.) 67, § 78.

⁵ Collyer on Part. *ub. sup.* Opinion of Story, J., in Hazard v. Hazard, 1 Story, 371.

⁶ See opinion of Walworth, Chancellor, in Champion v. Bostwick, 18 Wend. 175.

(a) But the general manager has such power. Walker v. Great Western R. L. R. 2 Ex. 228. See Toledo R. v. Rodrigues, 47 Ill. 188; Stephenson v. New York R. 2 Duer, 341.

§ 581. The question as to the liability of carrier-partners has arisen in several instances in England. "In many instances," says Mr. Justice Bayley, "one coach proprietor horses a coach for one stage, another for a second, and so on, and in some instances the man who finds the horses finds the coachman also. Shall this take away the liability of all the proprietors? Shall it be said, if the coach does an injury upon a given stage, that the proprietor who finds the horses and driver for that stage shall alone be answerable? The horses and driver are found by one to do the work of all; they are employed upon the work, and for the benefit of all; and therefore, all are responsible."¹ In an action on the case to recover damages for breaking the plaintiff's windows, in consequence of the negligence of the driver of the defendant's wagon, it appeared that the defendant and one Dyson were carriers from London to Gosport, and, by an arrangement between them, Dyson horsed the wagon from London to Farnham, and the defendant from Farnham to Gosport; and when the injury happened the wagon was drawn by the horses and driven by the servant of Dyson, with whose employment the defendant had no concern; and the wagon was the property of the defendant. The plaintiff, it was held, was entitled to recover, on the ground that the defendant and Dyson were jointly entitled to the profits; that the wagon was drawn for the benefit of the defendant as well as Dyson; and that the driver was legally the servant of the defendant, though for some purposes, and as between the parties themselves, he was the servant of Dyson alone.² Where the plaintiff and the defendant were joint proprietors of a stage-coach running from A to B, the former providing horses for one part of the road, and the latter for the other, and the profits of each party were calculated according to the number of miles his horses travelled, and the plaintiff received the fares of the passengers, and gave a weekly account of the receipts and disbursements belonging to the coach of the defendant; it was held that the plaintiff and defendant were partners; and that, in an action by the former against the latter upon a separate transaction, he could not set off a balance due to him upon such weekly accounts.³ Where the plaintiff agreed with the defendant to convey by horse and cart

¹ *Laugher v. Pointer*, 5 B. & C. 547.

² *Fromont v. Coupland*, 9 Moore, 319.

³ *Waland v. Elkins*, 1 Stark. 272.

the mail between N. and B. at £9 a mile per annum, and to pay his proportion of the expenses of the cart, &c.; the money received for the carriage of parcels to be divided between the parties, and the damage occasioned by loss of parcels, &c., to be borne in equal portions; it was held that this agreement constituted a partnership, and not a mere measure of wages; and that, consequently, the plaintiff could not sue the defendant for the £9, as stipulated.¹

§ 582. An action on the case was tried at the Oneida Circuit in New York, which was brought against the defendants, as the owners of a stage-coach, for an injury sustained by the wife of the plaintiff in being thrown from a wagon in which she was riding, in consequence of a stage-coach belonging to the defendants, through the negligence of the driver thereof, coming in contact with the wagon; and the defendants pleaded the general issue. It appeared on the trial that the defendants ran a line of stage-coaches from Utica to Rochester, and that the route was divided into sections; a section extending from Utica to Vernon was occupied by one Dodge, one of the defendants; another section, extending west, was occupied by one Ewers and others; and the remainder of the route by Champion and Bissell. The business was conducted, and the proceeds of the concern were divided, thus: The occupants of each section provided their own carriages and horses, employed their own drivers, and paid the expenses of their separate sections of the route, except the tolls at turnpike gates; and the moneys received as the fare of passengers, after deducting such tolls, were divided among the occupants of the several sections, in proportion to the number of miles of the route run by each. The injury in question occurred on the section of the route occupied by Dodge, the stage-coach which was driven against the wagon was owned by him, and the driver of it was employed by him. The judge charged the jury, that, upon these facts, the defendants must be considered partners, and that they were all responsible for any injury occasioned by the negligence of either of the drivers of the coaches on either section of the route, as each driver was the servant of all the individuals connected in the business; that the fact, that the occupants of each section employed their own

¹ Green v. Beesly, 2 Bing. N. C. 108.

drivers and paid the expenses of their own section, did not discharge them from liability; that a right to a division of the fare received from passengers, after paying the tolls, in proportion to the distance run by the occupants of the respective sections, was an interest in the profits, constituting them partners, and rendering them liable in the action against them. The defendants, on a bill of exceptions to this charge, moved for a new trial, which in the Supreme Court was denied. Nelson, J., in giving the opinion of the court, said: "Each sharing in the profits of the whole route, and of course of each section of it, it is not only just, but in accordance with well-settled principles of law, to hold all responsible for the faithful discharge of their duty; and to respond in damages for any injury which happens from the negligence or unskilfulness of any of the proprietors or their servants. It is just to the public and to themselves. The former have a right to claim the responsibility of all who profit directly by their patronage; and, as to the latter, the loss should be borne by all. The drivers themselves are generally irresponsible men, and so frequently are single proprietors. The public safety and convenience will depend essentially upon the application of the rule of joint responsibility of all the proprietors, who will then see to it that all their copartners, and all who are employed in the concern, are trustworthy." The judgment was affirmed by the Court of Errors.¹

§ 583. A line of stage-coaches, in Massachusetts, was run by two persons from Barre, through Holden, to Worcester, and back; and it was agreed that one of them should furnish and maintain horses and coaches, and receive the money paid for the transportation of passengers between Holden and Worcester, and that the other should do the like between Holden and Barre. They employed a man to drive all the way from Barre to Worcester and back, at a certain sum per month and perquisites; and money was delivered by the plaintiff to this driver to carry from Barre to Worcester, but the driver absconded without delivering it. It was held that the driver was the servant of the two persons jointly, and that they were jointly liable to the plaintiff for the money. The court, in giving their opinion, said: "If the driver was the servant of one of the defendants at

¹ *Bostwick v. Champion*, 11 Wend. 571; 18 Wend. 175.

one end of the line, and of the other at the other, there were two contracts; and this brings us to the general question, whether the defendants were so connected as to be jointly liable for his acts. It is not easy to decide whether they were interested in the whole line, or each at one end only. It should seem in the outset that there was but one enterprise, namely, to run a line of stage-coaches from Barre and Worcester and back. The contract between the defendants was not a stipulation that one would run coaches one part of the way, if the other would the other part; but it seems to have been a joint undertaking, and the advertisement was of a stage-coach running from Worcester and Barre and back. Each of the defendants was at the expense of supporting the line at one end of the route; and if the arrangement had been to divide the profits equally or proportionably, there would have been a partnership beyond any doubt. Does it make a difference that they divided the profits according as they were earned at each end? The question is not without difficulty, but on the whole we think they must be considered so far jointly concerned as to be jointly liable for the driver's act in this particular instance. They jointly hired him, and for a joint object; and the well-managing of the business at one end of the line was of importance to the other."¹

§ 584. A, B, and C and D and E agreed to run a line of stage-coaches from Albany to Utica; each of the three parties was to run a separate portion of the road, and to furnish his own horses and carriages, at his own expense and risk; but extra expenses for extra carriages were to be paid jointly. A, B, and D met, and the accounts between the parties were examined and adjusted, when there was found a balance due from D and E to B and C, for moneys received at Albany. It appearing that D and E, being jointly concerned in running their part of the line, and being generally understood to be partners, E was held to be jointly chargeable for the money received by D, and for his acts; and that an action for money had and received would lie against D and E to recover the balance so found to be due; and there was no such partnership existing between the five persons concerned as would prevent such a suit. The articles of agreement existing between all the five persons concerned in running the

¹ Cobb v. Abbott, 14 Pick. 289.

stage did not at all interfere with the suit. The parties had agreed with each other to run a stage from Albany to Utica, but with distinct and separate interests and rights; and each party had his distinct share of the road.¹

§ 585. The facts that several persons associate together to run a line of stage-coaches, that they have a general meeting, and that debts are contracted on account of the association by only some of the members of it, are not sufficient to prove a partnership.² And the fact that several persons actually subscribe an agreement to pay money for the purpose of establishing a line of stage-coaches,—the instrument containing a stipulation that no subscriber should be liable to pay if he chose to abandon his share, and that a refusal to pay should operate as an abandonment of his share,—does not constitute a partnership; and therefore the subscribers who refuse to pay cannot be charged as partners by those who have paid more than their proportion. In fact, it is difficult to imagine a contract to be more cautiously framed to avoid a partnership than this.³ If a partnership actually formed for the purpose of running stage-coaches issue to its members certificates of their shares in the joint stock, containing a provision that the shares shall not be transferred without the consent of the directors, the person to whom a share has been assigned without such consent cannot allege himself to be a partner, and compel the company to account. It is indeed settled, as a general principle, that a copartnership cannot be compelled to receive a stranger into their league, as it is founded in personal confidence.⁴ Still, if it appears from the course of business that a special provision, like the one mentioned, has by express or tacit consent been disregarded, assignments and transfers will be held valid, as regards creditors, although not made in compliance with it.⁵

§ 586. Carriers are sometimes engaged in the transportation of what are called “consignee passengers,” that is, passengers who are to be carried to a certain terminus, and then to be delivered to other carriers. There were certain persons engaged as such carriers between the city of New York, and various places at the West, by the way of the Hudson River, and the

¹ Wetmore v. Baker, 9 Johns. 307.

² Chandler v. Brainard, 14 Pick.
285.

³ Clark v. Reed, 11 Pick. 446.

⁴ Kingman v. Spurr, 7 Pick. 234.

⁵ Rainhard v. Hovey, 13 Ohio, 300.

canals and lakes, who entered into an arrangement with other carriers, by which it was mutually agreed, that the former should deliver up their freight and passengers to the latter at Albany, and their down freight at Schenectady, the termini of the railroad; and that the latter should transport the freight and passengers over their road. The contract in respect to the price for transportation, made between the owners of the goods and the party of the first part, was to govern the compensation of the party of the second part, and they were to be paid in the proportion that thirty miles bore to the whole distance the goods "were transported on the canal"; or rather in proportion that thirty miles bore to the whole distance the goods would have been transported on the canal, had the party of the first part run their boats between Albany and Schenectady, instead of employing the party of the second part to carry between those places. The party of the second part brought an action of assumpsit to recover of the party of the first part for the transportation of freight and consignee passengers over their railroad for the party of the first part in the year 1839; and the defence was, that the plaintiffs and defendants were partners in the transaction in question, and consequently, without a balance struck and promise of payment, the plaintiffs could not sue at law. Bronson, J., who delivered the opinion of the court, was unable to see that this made out a partnership between the parties, there being no community of interest, or division of profits of a joint concern between the parties. He said: "The contracts for transportation were all made between the defendants and the owners of the goods. The plaintiffs had no concern, either for profit or loss, with the river, canal, or lake transportation. There was no general account of profit and loss upon the whole business to be adjusted between the parties. One party might make a profit by the business, while it proved ruinous to the other. In short, the case comes to this: The defendants, having undertaken to perform work and labor for third persons, employ the railroad company to do a part of the work for them, agreeing that they will pay the company for its services the same price in proportion to distance which the defendants themselves are to receive. I do not see how this makes out a partnership, either as between the parties themselves, or in relation to third persons." One fact in the case was stated by the learned judge to

be, that the company was to furnish "warehouse facilities," and pay a portion of the expense of offices at each end of the road. But this, in his opinion, did not alter the nature of the contract.¹

§ 587. A ship-master having agreed to take the defendant's vessel for the purpose of obtaining employment in the freighting business, engaged to victual her and man her, and pay half of all charges, pilotage, &c., and the defendant engaged to pay the other half, together with eight dollars per month for one man's wages, and to put the vessel in sufficient order for business; and all money so stocked in the vessel, whether for freight or passage or whatever, was to be equally divided between the master and the defendant, each party accounting for the above; it was held, that the master was owner *pro hac vice*; that the contract did not make him and the defendant partners; and that the defendant was not answerable to a shipper of goods which had not been delivered according to the bill of lading.² Indeed a partnership, between the defendant and the ship-master in the employment and earnings of the vessel, could not be predicated on the above facts, any more than in all the cases in which the charter of a vessel was agreed to be paid by a portion of the earnings.

¹ Mohawk R. v. Niles, 3 Hill, 162. A, B, and C were common carriers from L. to F., a separate portion of the road being allotted to each; and it having been stipulated, also, that no partnership should exist between them. A, for himself and the other parties, agreed with the Mint to carry coin from L. to F., and afterwards makes another agreement with the Mint to carry other coin to places on the road. It was held, that the parties were entitled to share in the profits of this agreement. Russell v. Anstwick, 1 Sim. Ch. 54. In Massachusetts it is provided by statute, that, when railroads unite, the corporations may contract with each other as to transportation. Any railroad corporation, already, or which may be, created in that State, and any other

adjoining State, is authorized to contract with any other railroad corporation created as aforesaid, whose road enters upon or is connected with the road of the corporation so contracting, to do and perform all the transportation of persons and freight, upon and over said railroad, upon such terms and conditions as may be mutually agreed by the parties. Act of 1838, c. 99, § 1, p. 70. (a)

² Cutler v. Winsor, 6 Pick. 335. See Boardman v. Keeler, 2 Vt. 65; Harding v. Foxcroft, 6 Greenl. 76. The master and crew of a ship engaged in a whaling voyage, who are to receive, in lieu of wages, a proportion of the net proceeds of the oil which shall be obtained, are not partners with the owners of the ship. Baxter v. Rodman, 3 Pick. 435.

(a) See Gen. Sts. Mass. 1860, c. 63, § 115.

§ 588. Ferrymen, we have seen, are common carriers,¹ and the question may sometimes arise whether the owner of a ferry is solely liable for losses and injuries from negligence in the management of the ferry, or whether he is liable in connection with another person with whom he has made arrangements in respect to the management or use of the ferry. B., the owner of a ferry, leased it to F. for two years, in consideration of \$1,000 paid him by F. in cash; and it was agreed between the parties, that, if the net profits of the ferry did not yield F. \$2,000 within two years, F. should hold over the term until the profits did yield that sum. It was further stipulated, that, if the profits gave more than \$2,000 within the two years, the surplus should be equally divided between them. It was held, upon these facts, that the agreement did not constitute a partnership in the ferry between B. and F.; and that B. was not liable for losses, by negligence at the ferry, during the term of F.'s tenancy thereof.²

§ 589. Several persons acting in connection as passenger carriers may, as among themselves, by the terms of their agreement in relation to one another, not be partners; and they may thus be liable to each other the same as if their interests were several. But this private arrangement can in no way vary the rights of third persons or the public, legally flowing from the general arrangement, under which they hold themselves out as jointly interested, and by which they participate in the profits of the concern. They would be still liable for an injury received by a passenger through the negligence of their driver.³

14. Actions against.

§ 590. In considering the different duties of passenger carriers, the first which received our attention was their duty to receive all persons as passengers who offer to become such. This duty results from their setting themselves up, like common carriers of goods and merchandise, for a public and common employment for hire; and a breach of it is a breach of the law for which an action lies.⁴ The rule is, that if no place be taken in the vehicle, and the carrier refuses to carry a person, with his baggage, who

¹ *Ante*, §§ 82, 130.

Bostwick v. Champion, 11 Wend.

² *Bowyer v. Anderson*, 2 Leigh, 572.

550. And see *ante*, § 147.

⁴ See the subject fully considered,

³ See opinion of Nelson, J., in *ante*, §§ 524-531.

offers himself as a passenger, provided he has room, and the person so offering conforms to the reasonable regulations of the carrier, the declaration should be in case. The action was case in New Hampshire,¹ and the declaration alleged, that the defendant was part owner and driver of a public stage-coach from Nashua to Amherst and Francestown; that on the 31st of January, 1837, the plaintiff applied to him to be received into his coach at Nashua, and to be conveyed from thence to Amherst, offering to pay the customary fare; and that the defendant, although there was room in the coach, refused to receive the plaintiff. It is clearly necessary that it should be averred in the declaration that the plaintiff was willing and ready to pay the defendant the amount which the defendant was legally entitled to receive for the receipt and carriage of the plaintiff and his baggage; though it is not necessary that he should make an absolute tender; and the general allegations in the declaration would be similar to those of the declaration in an action against a common carrier of goods, for refusing to receive and carry them.²

§ 591. A passenger in a public conveyance who receives an injury while travelling, in consequence of the negligence or misconduct of the proprietor or of his driver or servant, may at his election sue the proprietor in assumpsit on the implied contract for a safe conveyance, or in case as for the tort.³ And, as in the instance of carriers of goods and merchandise, if the plaintiff adopts the former form of action to entitle him to recover, he must prove the liability of all the parties sued;⁴ but if he adopts the latter, he may recover against any of the defendants who are liable.⁵ And in an action on the case against ten defendants as the proprietors of a coach, for injuries sustained by the plaintiff, a passenger, in consequence of negligence in driving, the jury found a verdict against eight of the defendants, and in favor of the other two; and judgment was entered accordingly.⁶ On the

¹ *Bennett v. Dutton*, 10 N. H. 481. The action was case in *Jencks v. Coleman*, 2 Sumn. 221.

² For the form of the declaration for refusing to receive goods, see *ante*, § 418, and that if an offer to pay is proved, it need not amount to what is strictly a legal tender. *Ibid.*

³ *Knight v. Quarles*, 2 Brod. & B. 102.

⁴ *Ante*, § 422 *et seq.*

⁵ *M'Call v. Forsyth*, 4 Watts & S. 179; *ante*, § 435 *et seq.*

⁶ *Bretherton v. Wood*, 3 Brod. & B. 54.

other hand, if a declaration be even framed in case, yet if it be founded on contract, judgment cannot be given for some defendants and against others. Such was the case in Connecticut,¹ where the defendants were the proprietors of a line of stage-coaches, and were sued for not performing their undertaking, in form in case; but the suit being in substance on the contract, the court held that the plaintiff must, in every essential particular, prove the contract as he had alleged it.²

§ 592. The plaintiff can recover only on the grounds stated in his declaration; and hence, in an action by a passenger for an injury done to him by the overturning of a stage-coach, if the declaration states that the servants of the defendant negligently "drove, conducted, and managed the coach," the plaintiff cannot recover if the negligence was in sending out an insufficient coach.³ So, if the declaration charges the injury to the passenger to the want of skill and care of the driver, and not to any deficiency in the coach, harness, or horses, proof that the lines were broken can give no right of recovery to the plaintiff.⁴ (a)

¹ Walcott v. Canfield, 3 Conn. 194, and cited more fully, *ante*, § 438.

² But, on the subject of misjoinder and nonjoinder of parties in actions on the case, and in actions of assumpsit, and as to the distinctive character of the declaration, whether it be in law, in case, or assumpsit, and as to the pleadings, evidence, &c., in the same, we refer the reader to the preceding Chapter X.

³ Per Littledale, J., Mayor v. Humphries, 1 Car. & P. 251.

⁴ McKinney v. Neil, 1 McLean, C. C. 540. Mr. Greenleaf (2 Greenl. Ev. § 222) conceives the following count in assumpsit against a passenger carrier for bad management of a sufficient coach, would be good. "For that the said (defendant) on — was the proprietor of a coach for the carriage of passengers with their luggage be-

(a) In Roberts v. Graham, 6 Wall. 578, an action was brought against a common carrier for not carrying the plaintiff according to contract. The declaration alleged that by the breach "the plaintiff was subjected to great inconvenience and injury." *Held*, that this was not an allegation of special damage; but as the objection of the variance between the allegation and the proof was not taken when the evidence was offered, it was *held* to be too late to take it after the evidence was closed. For the rule of damages for breach of a passenger contract, see Pearson v. Duane, 4 Wall. 605; Yonge v. Pacific Mail S. Co. 1 Calif. 353; Williams v. Vanderbilt, 28 N. Y. 217; Benson v. New Jersey R. 9 Bosw. 412; Hamlin v. Great Northern R. 1 H. & N. 408; Hobbs v. London R. L. R. 10 Q. B. 111. A passenger injured by the fault of a carrier is not, as a general rule, entitled to exemplary damages. Milwaukee & St. Paul R. v. Arms, 91 U. S. 489.

§ 593. One of the reasons, as there has before been occasion to state, why the remedy by the action of assumpsit against common carriers of goods is preferable to that of an action on the case, is, that it survives against the executor or administrator.¹ The principle laid down by Lord Mansfield² is, that "where the cause of action is money due on a contract to be performed, gain or acquisition to the testator, by the work and labor or property of another, or a promise by the testator express or implied; when these are causes of action, the action survives against the executor." The distinction clearly is between causes of action which affect the estate, and those which affect the person only; the former survive for or against the executor or administrator, and the latter die with the person.³ The general rule of law is *actio personalis moritur cum personâ*, — a personal right of action dies with the person; under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage must be stated on

tween — and — for hire and reward; and thereupon, on the same day, in consideration that the plaintiff, at the request of the said (defendant), would engage and take a seat and place in said coach, to be conveyed therein from said — to — for a reasonable hire and reward to be paid to him by the plaintiff, the said (defendant) undertook and promised the plaintiff to carry and convey him in said coach, from — to —, with all due care, diligence, and skill. (*) And the plaintiff avers that, confiding in the said undertaking, he thereupon engaged and took a seat in said coach, and became a passenger therein, to be conveyed as aforesaid, for such hire and reward to be paid by him to the said (defendant). But the said (defendant) did not use due care, diligence, and skill in carrying and conveying the plaintiff as aforesaid; but on the contrary so overloaded,

and so negligently and unskilfully conducted, drove, and managed said coach, that it was overturned; by means whereof the plaintiff was grievously bruised and hurt [*here state any other special injuries*], and was sick and disabled for a long time, and was put to great expense for nursing, medicines, and medical aid."

If the injury arose from insufficiency in the coach, or horses, insert at (*) as follows: "and that the said coach was sufficiently staunch and strong, and that the horses drawing the same were and should be well broken and manageable, and of competent strength;" and assign the breach accordingly. See *ante*, § 435, n. 3.

¹ *Ante*, § 435.

² *Hambly v. Trott*, Cowp. 372.

³ Per Wilde, J., in *Stebbins v. Palmer*, 1 Pick. 71. *Orme v. Broughton*, 10 Bing. 533. *Grace v. Grace*, 2 M. & W. 190.

the record, inasmuch as the court cannot intend it. Damage subsisting in the mere personal suffering of the testator, and all injuries affecting his life or health, are undoubtedly breaches of the implied promise by the persons employed to exhibit a proper portion of care and skill; but there seems to be no authority to sustain any attempt on the part of an executor or administrator to maintain an action in such case.¹ An administrator cannot have an action for breach of promise of marriage to the intestate, where no special damage is alleged.² Neither will an action for a breach of promise of marriage, where no special damage is alleged, survive against the administrator or executor of the promisor.³

§ 594. But where the damage done to the personal estate of the testator or intestate, or to the estate of another by the testator or intestate, in his lifetime, can be stated on the record, that involves a case different from the two cases just above stated. A plaintiff, as administrator, declared that his intestate employed the defendant as his attorney to investigate the title to certain premises which the intestate had contracted to purchase, and that the defendant undertook to do so, and assigned, as a breach of the defendant's promise, that he caused the intestate to accept a defective title, whereby the latter was wholly unable to dispose of the premises in question during his life; and the count then went on to allege special damage to the deceased's personal estate. To this declaration there was a demurrer on the part of the defendant, in support of which it was attempted to be argued, that the action, though in form *ex contractu*, was in substance *ex delicto*,⁴ the breach of promise being no more than a tort arising out of a neglect of duty. The court were, however, unanimous in their opinion that there was no ground for the demurrer, an express promise being alleged, a breach of it in the lifetime of the testator, and an injury to his personal property; the truth of which allegation was admitted by the demurrer; that it made no difference in the case whether the promise was express or implied, the whole transaction resting in contract; that though, perhaps, the intestate might have brought case or assumpsit at his election, assumpsit being the only remedy for the adminis-

¹ See the judgment of Lord Ellenborough, in *Chamberlain v. Williamson*, 2 Maule & S. 408.

² *Chamberlain, &c., ub. sup.*

³ *Stebbins v. Palmer*, 1 Pick. 71.

⁴ See *ante*, §§ 436-440.

trator, it was necessary that the action should be maintained, or the defendant might escape out of the consequences of his misconduct, and the intestate's estate suffer an irreparable injury. It was further observed by the court, that, if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, though it was clear that in his lifetime he might, at his election, sue the coach proprietor in tort or in contract, it could not be doubted that his executor might sue in assumpsit for the consequence of the coach proprietor's breach of contract.¹

§ 594 *a*. The act of the State of New York, of December 13, 1847, providing for compensation for wrongful act, neglect, or default, limits the damages to be recovered to a just and fair compensation with respect to the pecuniary injury resulting to the wife and next of kin of the deceased; if there is no wife and next of kin of the deceased, there can be no such pecuniary damage to be recovered as the act contemplates.²

§ 595. It would seem rather clear from the above authorities, that an injury which affects the health or life of deceased persons, and which was occasioned by the negligence or unskilfulness of a passenger carrier, although it is a breach of the implied promise by such carrier to exhibit a proper degree of care and skill, and, if stated and proved to be detrimental to the estate of the deceased, is the subject of an action by his executor; yet, as importing a mere personal injury, it is not actionable save by the testator himself. And so of a suit against an executor of the party committing the injury, or of the promisor; if no special damage to the estate of the person injured is alleged and proved, an action does not survive.³

§ 596. The question then arises, — what shall be considered a

¹ Knight v. Quarles, 2 Brod. & B. 102.

² Lucas v. New York R. 21 Barb. 245.

³ The personal representatives are liable, as far as they have assets, in all the contracts of the deceased broken in his lifetime; and likewise upon such as are broken after his death, for the due performance of

which skill or taste was not required. Per Parke, B., Siboni v. Kirkman, 1 M. & W. 423. And see Com. Dig. "Administration," (B). But at common law no action founded in tort, and in which the plea was "not guilty," is held to survive against the executor or administrator of the tortfeasor. See note to Little v. Conant, 2 Pick. 527 (edit. 1848).

damage to the estate of a person, in cases like the above mentioned? In a case in New York,¹ the declaration charged that by the negligence of the defendant in driving a gig, a son of the plaintiff, of the age of about ten years, was run over and killed; and it was alleged in one of the counts, by way of special damage, that in consequence of the occurrence, the wife of the plaintiff became sick, and remained so for a long time, and that the plaintiff was not only deprived of her society, but was subjected to great expense in attendance upon her, and in effecting her recovery. Damage was also alleged in another of the counts, as the loss of the service of the child for a period of ten years and upwards. The happening of the accident and the sickness of the plaintiff's wife as alleged were proved. The judge instructed the jury, that the only question in the case was, whether the defendant had been guilty of negligence; that if they should find that he was so chargeable, then the plaintiff would be entitled to recover such sum by way of damages as they should be of opinion the service of the child would have been worth to him until he became twenty-one years of age, and also that he was entitled to recover damages occasioned by his wife's sickness, consequent upon the accident. Upon the finding of a verdict for the plaintiff for two hundred dollars, and upon a motion for a new trial, the court, by Nelson, C. J., said: "The damages were specially laid in the declaration, and were clearly proved to have been the direct consequence of the principal act complained of; they therefore came within the well-settled rule respecting special damage."

§ 597. So far as regards the deprivation of the society of the wife, which was alleged in the declaration in the above case, by way of special damage, it does not appear, in the opinion given by the court, whether they did or did not consider that by itself a sufficient ground for the plaintiff's recovery. In an action in another case against the proprietors of a stage-coach, on the top of which the plaintiff and his wife were travelling, when it was overturned; whereby the plaintiff himself was much bruised, and his wife was so severely hurt, that she died about a month after in a hospital; the declaration, besides other special damage, stated, that "by means of the premises, the plaintiff had wholly

¹ Ford v. Monroe, 20 Wend. 210.

lost, and been deprived of, the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great vexation and anguish of mind." It appeared that the plaintiff was much attached to his deceased wife, and that he, being a publican, had lost the use of her in conducting his business. Lord Ellenborough held, that the jury could only take into consideration the bruise which the plaintiff had himself received, and the loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution. The damage, in other words, as to the plaintiff's wife, must stop with the period of her existence.¹

§ 598. Another ground of special damage, alleged in the above case of *Ford v. Monroe*, was for the loss of service of the child who was killed, when at the age of about ten years, and the jury were instructed that the plaintiff was entitled to such sum, by way of damages, as they thought the service of the child would have been worth if he had arrived at twenty-one years of age. But how, it may be inquired, were the jury authorized to suppose that the child would have arrived at the latter age, if he had not been killed in the manner he was? A similar interrogatory may to another case be applied: In an action by an administrator to recover damages for the loss of life of his intestate, the court may instruct the jury to compute the damages by the probable accumulations of a man of the age, habits, health, and pursuits of the deceased during what would have probably been his lifetime.² In this respect the charge appears somewhat at variance with the view taken of the law by the court, in respect of damage by loss of service.³ The action in that case was trespass for driving a carriage against the plaintiff's son and servant, whereby the plaintiff was deprived of his son's services as servant, and was put to expense in obtaining his cure. The child was two years and a half old, and the plaintiff might have placed him in a hospital which would not have occasioned any expense, but

¹ *Baker v. Bolton*, 1 Camp. 493. If an action is brought for an injury sustained by the wife (and not by the husband), the damages are to be given accordingly. The husband must be joined in the action, but the damages

are to be given for the injury sustained by her.

² *Pennsylvania R. v. McCloskey*, 23 Penn. State, 526.

³ *Hall v. Hollander*, 4 B. & C. 660.

he preferred having him at home; and hence it was held, that the loss of service was the gist of the action, and that the child being incapable of performing any service by reason of his tender age, the action was not maintainable, particularly as no expense had been necessarily incurred. "I apprehend," said Bayley, J., "that the gist of the action depends upon the capacity of the child to perform acts of service. Here it is manifest that the child was incapable of performing any service: the authorities upon this point are all one way. In the cases which have been cited, the child being capable of performing acts of service, and living with the parent, would naturally be called upon to perform some acts of service; and it was therefore held, that service might be presumed, and that evidence of it need not be given." By Holroyd, J.: "The mere relationship of the parties is not sufficient to constitute a loss of service: and the reasoning in all the modern cases shows that some evidence of service is necessary." Abbott, C. J., said, that the court were called upon to go further than the principle of the common law, that the master may maintain an action for a loss of service, sustained by the tortious acts of another, whether the servant be a child or not; and they were asked to hold that the action was maintainable, although no service was or could be performed by the child; and that too, upon a declaration alleging the existence of the relation of master and servant, and the loss of the services by such servant. "Such a decision," said he, "could not be warranted by any former case."

§ 599. An action on the case,¹ before Bosanquet, J., shows recovery of damages for an injury committed by a collision on a highway to the plaintiff's son and servant, but the age of the son is not stated. In Maine,² it was held, that the father of a minor daughter, eighteen years old, might maintain an action against an individual, to recover damages sustained by the plaintiff in the loss of the services of the daughter, by an injury consequent upon a collision between the defendant's wagon, by his negligence, and the wagon in which the daughter was riding. The court, in giving their opinion in this case, are particular in distinguishing it from *Hall v. Hollander*, in which the child was too young to perform any service. The court also held, that evidence of the complaints of suffering made by the daughter of the plain-

¹ *Williams v. Holland*, 6 Car. & P. 23. ² *Keenard v. Burton*, 12 Me. 39.

tiff, after receiving the injury, but during the time when it was material to prove such suffering to have existed, was admissible.

§ 600. In a civil court, the death merely of a human being cannot, at common law, be complained of as an injury, and, as in the above case of *Baker v. Bolton*,¹ it was held, damage must stop at the moment of death. Such has been regarded by the Supreme Court of Massachusetts as the doctrine of the common law,² in which that court held that an action on the case could not be maintained by a widow to recover damages for the loss of her husband, or by a father for the loss of his child, in consequence of the death of the husband or child, occasioned by the carelessness or fault of the agents or servants of a railroad corporation. In delivering the opinion of the court in these cases, Metcalf, J., observed: "If these actions, or either of them, can be maintained, it must be upon some established principle of the common law; and we might expect to find that principle applied in some adjudged case in the English books; as occasions for its application must have arisen in very many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. No such case was cited by counsel; and we cannot find any. This is very strong evidence, though not conclusive, that such actions cannot be supported. (a) But it is not necessary to rely entirely on this negative evidence. For we find it adjudged, that the death of a human being is not the ground of an action for damages.³ (b)

¹ *Baker v. Bolton*, *ante*, § 579. ² *Carey v. Berkshire R.* 1 Cush. See 2 Cro. Eliz. 55, 770; *Wheatly v.* 475.
Lane, 1 Wms. Saund. 216, n. (1); ³ *Baker v. Bolton*, 1 Camp. 493.
Lucas v. New York R. 21 Barb. 245.

(a) In *Osborn v. Gillett*, L. R. 8 Ex. 88, it is *held* that a master cannot maintain an action for injuries which cause the immediate death of his servant. In *Bradshaw v. Lancashire R.* L. R. 10 C. P. 189, a passenger on a railway was injured by an accident, and, after an interval, died in consequence thereof. *Held*, that although his executor could not recover for the personal injuries, yet an action would lie for the damage done to his personal estate, arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. See *Leggott v. Great Northern R.* 1 Q. B. D. 599, which follows *Bradshaw v. Lancashire R.* as a precedent, but questions it.

(b) See also *Lyons v. Woodward*, 49 Me. 29; *Palfrey v. Portland R.* 4 Allen, 55; *Hubgh v. New Orleans R.* 6 La. Ann. 495; *Eden v. Lexington R.* 14 B.

§ 600 *a*. The law so remained in England until a very late period, and was so prior to the statute 9 & 10 Vict. c. 93. By section 1 of that act, it is enacted, that “whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.” By section 2, it is further enacted, “that every such action shall be for the benefit of the wife, husband, parent, and child (*a*) of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury by their verdict shall find and direct.” By section 3, the action for damages must be brought within twelve calendar months after the death of such deceased person. It will be observed that this statute applies only where death ensues from the particular wrongful act, and does not, therefore, affect the class of cases where a tort is committed which does not occasion death.¹ This statute seems to have revived the principle of the

¹ For a tort committed to the per- no action can be maintained against son, it is clear that, at common law, the personal representatives of the tort-

Mon. 204; *Worley v. Cincinnati* R. 1 Handy, 481; *Connecticut Ins. Co. v. New York* R. 25 Conn. 265. By a statute in Massachusetts (act of 1842, c. 89), trespass on the case for damage to the person, survives, so that in the event of any person entitled to bring such action, the same may be prosecuted by his administrator. Under this it has been *held*, that if the death is instantaneous the action does not survive. *Kearney v. Boston* R. 9 Cush. 108. If the person lives after the accident, though in a state of insensibility, the right of action survives. *Hollenbeck v. Berkshire* R. 9 Cush. 478. *Bancroft v. Boston & Worcester* R. 11 Allen, 34. See Gen. Sts. Mass. c. 127, § 1.

(*a*) A bastard is not a child within the meaning of this section. *Dickinson v. North Eastern* R. 2 H. & C. 735.

old Saxon law, and to allow the relations of the deceased to recover damages to be apportioned among them according to the injury resulting to them respectively.¹ In a case involving the construction of this statute, the question was, whether the jury, in giving damages apportioned to the injury resulting from the death of the deceased, to the parties for whose benefit the action was brought, were confined to injuries of which a pecuniary estimate may be made, or may add a *solatium* to those parties in respect of the mental suffering occasioned by such death; and it was held by the Court of Queen's Bench, that the latter could not be taken into consideration.² (a)

§ 601. An act has been passed by the legislature of Massachusetts on the same subject, but very different in its provisions from the one above given; and materially different, in so far as respects the provision in the English act for determining the damages by a jury. The two acts in question are, indeed, framed on different principles, and for different ends. The English statute gives damages as such, and proportioned to the injury to the husband or wife, parents and children, of any person whose death is caused by the wrongful act, neglect, or default of another person; adopting to this extent the principle on which it has been attempted to support actions to recover damages for the loss of a husband or of a child. The statute of Massachusetts is confined to the death of passengers carried by certain enumerated modes of conveyance. A limited penalty is imposed as a punishment of

feasor, nor does it seem that the above statute, 9 and 10 Vict. c. 93, supplies any remedy against executors or administrators of the party who, by his "wrongful act, neglect, or default," has caused the death of another. Broom's Legal Maxims, 710. For the application of the doctrine, under the statute, of *Priestly v. Fowler* (*ante*, § 578), see *Reedie v. London R. 4*

Exch. 244; and for the doctrine applied under it, to cases of mutual negligence (*ante*, § 556 *et seq.*). See *Armstrong v. South Eastern R. 11 Jur.* 758.

¹ See the learned opinion of Lowrie, J., in *Pennsylvania R. v. McCloskey*, 23 Penn. State. 526.

² *Blake v. Midland R. 18 Q. B.* 93; 10 Eng. L. & Eq. 437.

(a) For other cases under this statute see *Franklin v. South Eastern R. 3 H. & N.* 211; *Dalton v. South Eastern R. 4 C. B. (N. S.)* 296; *Pym v. Great Northern R. 4 Best & S.* 396; *Flinn v. Perkins*, 32 Law J. (N. S.) Q. B. 10; *Rowley v. London R. L. R.* 8 Ex. 221. In *Read v. Great Eastern R. L. R.* 3 Q. B. 555, it was held that an accord with the deceased during his lifetime was a good plea in bar to an action under the statute.

carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller within the prescribed maximum and minimum, according to the degree of blame which attaches to defendants, and not according to the loss sustained by the widow and heirs of the deceased. The penalty when thus recovered is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the State.¹ Thus the statute is as follows: "If the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stage-coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents in this commonwealth, such proprietor or proprietors, and common carriers, shall be liable to a fine not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs; one moiety thereof to go to the widow, and the other to the children of the deceased; but if there shall be no children, the whole to the widow, and if no widow, to heirs according to the law regulating the distribution of intestate personal estate among heirs."² (a)

¹ Per Metcalf, J., in delivering the judgment of the court, in *Carey v. Berkshire R.* 1 Cush. 475. See *Kearney v. Boston R.* 9 Cush. 108.

² St. 1840, c. 80. From the correspondent of the "Boston Post" of June 1, 1855: "Since the railroad accident at Norwalk, much has been said

respecting the laws in different States regarding the value of human life, or the pecuniary compensation due to relatives whose friends are slain by the carelessness of servants, or general mismanagement of a railroad. The decisions of the English courts, I think, should be good precedent for

(a) For cases under this statute, see *Commonwealth v. Boston & Worcester R.* 11 Cush. 512; *Commonwealth v. Eastern R.* 5 Gray, 473; *Commonwealth v. Sanford*, 12 Gray, 174. The provisions of this statute are re-enacted in Gen. Sts. Mass. 1860, c. 160, § 34, and applied to horse railroads. St. 1864, c. 229, § 37. *Commonwealth v. Metropolitan R.* 107 Mass. 236. See also Gen. Sts. Mass. c. 63, §§ 97, 98; *Commonwealth v. Boston & Worcester R.* 101 Mass. 201. In *Commonwealth v. Vermont & Massachusetts R.* 108 Mass. 7, a person who received permission to sell pop-corn on a railroad in consideration of his paying a certain sum quarterly and of furnishing ice-water to the passengers, was held to be a passenger within the statute, and not a servant. It was also held that the fact that his ticket had these words indorsed on it, "the corporation assumes no liability for any personal injury received while in a

§ 602. In respect to the remedy for the recovery of damages for an injury sustained by collision of carriages, in consequence

procedure here, and might well be made the basis of legislation on the subject. The gross absurdity of compensating a man for personal injury, but denying all compensation to his family in case he is killed, is too plain to need an argument. Look at two or three decisions in the English courts, based, I think, on common law, as I believe there is no special legislation, and no need of any on the subject. A lady was travelling with her husband on the Midland Counties Railway, in 1851, when another train ran into theirs, killing the husband and several others. The lady brought a suit, — a sum was offered her, but she would not accept it, — and it was contested. The killing was not denied, nor the carelessness of the action; it was merely a question of damages. The lady proved that her husband was a professional man, — a lawyer, I think, — and that his average annual income was £2,000. His age was proved; I believe he was thirty-eight. Life-insurance tables were then con-

sulted, and the average length or duration of lives beyond that period was ascertained. The probable duration of his life, or its 'value,' as life insurance has it, was found, and it reached, I think, fifty-two years, or fourteen years beyond the period of his death. They then took either one-half of his income, or one-third, — one-half, I believe, — for the lady, and computing the value by compound interest for fourteen years, awarded the amount, and it was nearly seventy thousand dollars. Now will any one deny that here was any thing beyond sheer and naked justice? The wealth or the poverty of the widow had nothing to do with it. Nothing was allowed in consideration of her anguish, attendant on the sudden death of a beloved companion. Even this in the English courts is held to be a part of the ground of a claim for pecuniary damages. I may make a mistake in some of the figures, but the principle laid down in getting at the damages is the important part. They footed up the

train to any season-ticket holder," was no defence to an indictment on the statute. There is also a law on this subject in New York, which limits the damages to \$5,000. Laws of 1847, c. 450, amended by Laws of 1849, c. 256. See *Oldfield v. New York R.* 4 Kern. 310; *Whitford v. Panama R.* 3 Bosw. 67; *Crowly v. Panama R.* 30 Barb. 99; *Perkins v. New York R.* 24 N. Y. 196; *Tilley v. Hudson River R.* 29 N. Y. 252; *McMahon v. New York R.* 33 N. Y. 642. Pennsylvania, — Act 15 April, 1851. Act 26 April, 1855. Act 10 December, 1856. *Pennsylvania R. v. Zebe*, 33 Penn. State, 318. *North Pennsylvania R. v. Robinson*, 44 Penn. State, 175. *Pennsylvania R. v. Henderson*, 43 Penn. State, 449; 51 Penn. State, 315. *Catawissa R. v. Armstrong*, 52 Penn. State, 282. Georgia, — *South Western R. v. Paulk*, 24 Ga. 356. New Jersey, — *Telfer v. Northern R.* 1 Vroom, 188. Illinois, — *Chicago v. Major*, 18 Ill. 349. Chicago R. v. Morris, 26 Ill. 400. Railroad Co. v. Barron, 5 Wall. 90. Wisconsin, — *Railway Co. v. Whitton*, 13 Wall. 270. Rhode Island, — *Steamboat Co. v. Chase*, 16 Wall. 522. The death in this case was caused by a marine tort, and it was contended that the admiralty had exclusive jurisdiction, and that a suit could not be maintained in a State court. The court held otherwise.

wholly of the negligence of the driver of one of them, an action of trespass may be maintained; and so also may that action be

pecuniary value of the husband exactly as they would tell the worth of a bale of cotton or the value of a certain number of shares of bank stock! Should the value of a laboring man, who can earn but five shillings a day, be computed as high as that of a professional man who has a large income? Now, is it more than fair, if, while knowing the great value of the goods they carry, a company carelessly mutilates, damages, or destroys their valuable freight, they should be called on to pay that value to the uttermost farthing, even though it takes all their profits and some capital to boot? Most certainly not. Then, too, suppose a man, the head of a family, should be killed under these circumstances, and his income of £300 a year is shown to be the entire support of his wife and children, and that his life is 'good' by the life-insurance tables for twenty years more, is £300 a year for twenty years, at compound interest, all the actual loss the widow and orphans sustain? Should the care, love, and guardianship of a husband and father be valued at nothing? I think they are worth a great deal.

"A gentleman in England had his little son, not twelve years of age, killed by a railway accident,—the entire fault of the conductors,—and a jury awarded him £2,000,—almost ten thousand dollars. They very justly considered something due to the feelings and affections of a bereaved parent. One more case. A commercial trader was greatly injured on the London, Brighton, and South Coast Railway, and the shock of his nervous system was so great that he had to give up his situation, and his physicians decided that in all probability he never could do business again. The company had offered him

£2,000, which he refused. His salary was £400 a year, and this sum at compound interest for about twenty years—the 'value' of his life according to life-insurance tables—was awarded him. Now let such decisions, either by the common law or special enactment, become the rule in the United States, and railway companies will soon be brought to a feeling sense of the value of their cargoes, and the necessity for caution. What an absurdity on the face of the New York law, that compensation for the death of a person shall not exceed \$5,000. Just as if an American citizen—a sovereign in his own right—could not be valued at a higher figure than a paltry thousand pounds, when mere 'subjects' of a monarchical state are valued at from five to ten times that sum! If railroad agents or canal boatmen smash up a crate of crockery, burn a bale of sheetings, or sink a parcel of hardware, the entire value is inquired after, and not only no deduction is made, but ten per cent is put on as prospective profits, loss of time, &c. Now, is a live and active man, one of the sinews of the republic, the entire stay of his family, a valuable member of society, to be more lightly estimated than a cook-stove, a piece of china-ware or a bale of cotton goods? Let intelligent legislators and jurors, who have studied their arithmetics, give us an answer."

From the "Boston Atlas" of May 26, 1853: "It is not generally known, that in the State of Connecticut a statute was framed, in the session of 1848, which provides that 'actions for injury to the person, whether such injury result in death or not, shall survive to the executor or administrator, provided not more than one year elapse between the injury and

maintained for any injury sustained by a foot passenger, by being run against by a carriage wholly in consequence of the person driving.¹ In either of these cases the act complained of is immediate, and not merely a consequence of the act which occasions the injury; and it matters not, so long as the injury complained of is direct and violent, whether the act which caused it be done intentionally or through negligence.² Thus, where the defendant, driving his carriage on the wrong side of the road, when it was dark, drove by accident against the plaintiff's curricule, it was held, that the injury which the plaintiff had sustained having been immediate, from the act of driving by the defendant, trespass might be maintained.³ It is a direct trespass to injure the person of another, by driving a carriage against the carriage

death, and provided also the cause of action shall have occurred subsequently to June 27, 1848.'

"This provision seems to have escaped general observation, owing to the fact that before the Norwalk massacre no case had occurred for its application. The plain construction of this statute authorizes the executors of any person injured or killed through the neglect or default of any person, or corporation, to recover damages, and without any restriction as to the amount. The 'Hartford Times' is informed that one suit has already been commenced by the surviving relatives of an eminent deceased physician for \$25,000, and another by the friends of one of the deceased Boston passengers for \$100,000.

"In New York a similar law exists, with the exception that the damages cannot exceed \$5,000 in each case. The object of this restriction was to guard against those vindictive and excessive damages which juries, under the influence of passion, or inflamed by the artful appeals of advocates, will sometimes give. It is presumed that the New York and New Haven Railroad Company are liable to be sued under the law of New York, as

well as under that of Connecticut, as the contract of passage was made in New York, and the company is also a New York corporation. If thus liable under the New York statute, the damages recovered against the New York and New Haven Company, for those who were killed at Norwalk, would amount to \$255,000, and the damages for injuries to persons and destruction of property to \$50,000 or \$60,000 more. Under the statute of Connecticut, the damages for the dead would be limited only by the verdicts of juries."

¹ See *ante* § 563 *et seq.*

² 3 Stark. Ev. (London ed. 1842) 1107, the owner of a ship, being himself on board, and standing at the helm, unintentionally runs her against another ship, from unskilful management; the remedy is trespass, and not case. *Covell v. Laming*, 1 Camp. 497. Trespass and not case is the proper action to recover damages for an injury sustained by the negligent driving of the defendant's horse. *Waldron v. Hopper, Coxe*, N. J. 339. And see *Vincent v. Stinehour*, 7 Vt. 62; *McLaughlin v. Pryor*, 1 Car. & M. 354. But see *post*, § 606.

³ *Leame v. Bray*, 3 East, 593.

wherein such person is sitting, although the last-mentioned carriage be not the property of, nor in the possession of the person injured;¹ and where the defendant drove his gig against another chaise, whereby the plaintiff's wife was much hurt and injured, it was held, that an action at the suit of the husband and wife was properly brought in trespass.² Where the defendant's horses and wagon were wilfully driven against the horses and wagon of the plaintiff, by which the plaintiff's horses were frightened, and ran and broke loose from their wagon, and they were thereby injured and the harness broken; it was held, that trespass was the proper remedy, and not trespass on the case.³ The defendant's gig, in which he was driving at a "brisk trot" through a narrow street, came in contact with the plaintiff's horse, which was loose in the street, by which the horse was killed; and the defendant was held liable in an action of trespass.⁴ (a)

§ 603. But case, instead of trespass, must always be adopted where the defendant's servant, and not the defendant personally, caused the injury by his carelessness, &c.⁵ In an action on the case against three defendants, proprietors of a stage-coach, for carelessness and mismanagement of their coach and horses, whereby the coach ran against the plaintiff and broke his leg; it was held, that the plaintiff might maintain case against all the proprietors, though he might perhaps have been entitled to bring trespass against the one who drove the coach. Holroyd, J., said, that the real ground of the action was the negligence of the defendant who drove, and "they are all responsible for the

¹ 1 Chitt. Pl. 127.

² Hopper v. Reeve, 7 Taunt. 698.

³ Rappelyea v. Hulse, 7 Halst. 257.

⁴ Payne v. Smith, 4 Dana, 497.

Where an infant hired a chaise, without the knowledge of his father, and the father ratified the act by directing the infant to pay the hire out of his wages, which belonged to the father;

it was held, that the father had such a special property in the chaise as would enable him to maintain trespass for an injury done to it during the term of hire. Boynton v. Turner, 13 Mass. 391.

⁵ 1 Chitt. Pl. (10th Am. ed.) 127. And see Barnes v. Hurd, 11 Mass. 57; Campbell v. Phelps, 1 Pick. 62.

(a) A ship-owner who refuses to carry a passenger whom he has engaged to carry, and proceeds on the voyage, without giving the passenger reasonable opportunity to remove his luggage, or who sails with the intent to carry it beyond the passenger's reach, thereby terminates the contract of carriage, and is liable in trespass for the carrying away of the luggage. Holmes v. Doane, 3 Gray, 328.

person appointed to drive, whether the person be or be not one of themselves. They are all responsible as the owners of the coach and horses. Trespass might lie against the driver by reason of his doing the particular act; but still there would be a ground of action against his co-proprietors, and that could only be in an action on the case, for they are not by his act made co-trespassers. If case lies against them, it lies against him also as a joint proprietor, if a ground of action remains, after the trespass has been waived."¹

§ 604. In order to identify the principal with an agent who commits a trespass, it is not sufficient to prove merely that the agent, when he offended, had the conduct of his master's lawful business; for although a principal is responsible for the negligence of his agent, he is not responsible for his wilful misconduct.² If the agent of A negligently drove the carriage of A against that of B, the agent would be liable in trespass, and A would be liable in case for the negligence of his servant;³ but if the agent in such case wilfully drove the carriage of A against that of B, without the assent of A, the latter would not be responsible.⁴ That is, a master is not liable for the wilful trespass of his servant.⁵ If the defendant's servant, in driving his master's carriage,

¹ *Moreton v. Hardern*, 4 B. & C. 223. The decision in this case is commented upon and approved by the court in *Wright v. Wilcox*, 19 Wend. 343, in which the court say, that, in a case of strict negligence, they see no reason why an action will not lie against both jointly. "They are both guilty of the same negligence at the same time, and under the same circumstances; the servant in fact, and the master constructively, by the servant his agent." See also *Ogle v. Barnes*, 8 T. R. 188; *Michel v. Abestree*, 2 Lev. 172; *Whittemore v. Waterhouse*, 4 Car. & P. 383.

² 3 Stark. Ev. (Lond. ed. 1842) 1111.

³ *Morley v. Gainsford*, 2 H. Bl. 441.

⁴ *Macmanus v. Crickett*, 1 East, 106.

⁵ *Wright v. Wilcox*, 19 Wend. 343.

In *Macmanus v. Crickett*, *ub. sup.* Lord Kenyon said: "When a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him." He puts the master's liability on the ground of negligence or unskilfulness, with no purpose but an execution of his orders. The court, in *Wright v. Wilcox*, *ub. sup.*, say: "The dividing line is the wilfulness of the act. If the servant makes a careless mistake of commission or omission, the law holds it to be the master's business negligently done. But it is different with a wilful act of mischief. To subject the master in such a case, it must be proved that he actually assented, for the law will not imply assent. In the particular affair there is, then, no

wantonly strike the horses of the plaintiff, in consequence of which the carriage of the plaintiff is injured, the defendant is not responsible; but if the servant so strike, although injudiciously, in the course of his employment, and in furtherance of it, the defendant is liable in case.¹ Where a trespass is the natural consequence of the act directed by the master to be done by a servant, the master is liable, although his direction to the servant is to avoid the trespass.² (a)

§ 605. In a case in New York,³ there was an action on the case for an injury sustained by the son of the plaintiff, who was a minor, in being run over by a wagon driven by S. W., the son of J. W., whilst in the employment of his father. The plaintiff's son was a very young lad, and on his way to school asked S. W. to permit him to ride; who answered that he might, when he got up a hill which he was then ascending. When the hill was ascended, the lad took hold of the side of the wagon between the front and the hind wheels. S. W. did not stop his team. He was cautioned by a bystander, that if he did not stop he would kill the boy. He looked behind him; the horses were then walking; and seeing the plaintiff's son and other boys attempting to get on the wagon, he cracked his whip, and put his horses on a trot. The plaintiff's son soon fell, and one of the hind wheels passed over him, and greatly injured him. A joint action was brought against the defendants. The judge charged the jury that both of the defendants were liable, whether the injury was wilful, or only attributable to negligence. But a new trial was granted, on the ground that it was difficult to infer from the evidence any thing short of a design in S. W., the driver, to throw the plaintiff's boy from the wagon. If S. W., the driver,

longer the presumed relation of master and servant. The distinction seems to resolve itself into a question of evidence."

¹ Croft v. Alison, 4 B. & Ald. 590.

² Gregory v. Piper, 9 B. & C. 591.

In an action of trespass, it is competent for the jury to consider the words which the defendant used subse-

quently to the trespass, in coming to the conclusion whether he was a joint trespasser with him actually committing the mischief. *McLaughlin v. Pryor*, 1 Car. & M. 354. And see *Chandler v. Broughton*, 1 Cromp. & M. 29; and *ante*, § 575.

³ *Wright v. Wilcox*, 19 Wend. 343.

(a) See *ante*, §§ 572-580. The owner of a steamboat is not liable for an injury to a passenger caused by the accidental discharge of a gun in the hands of an employee of the boat. *McClenaghan v. Brock*, 5 Rich. 17.

said the court, acted, in whipping the horses, with the wilful intention to throw the plaintiff's boy off, it was a plain trespass, for which his master was no more liable than if his servant had committed any other assault and battery.

§ 606. The weight of authority may now be in favor of the doctrine, that if an injury done by one person to another is both direct and consequential, the party injured has an election to bring case or trespass.¹ As where the defendant so carelessly drove his horse and gig as to run against the plaintiff in the street, and knock her down, whereby she was injured and

¹ *Ante*, § 602. *Blin v. Campbell*, 14 Johns. 432. That the trespass may be waived, see *Moreton v. Hardern*, *ante*, § 603. The general principle established in *Percival v. Hickey*, 18 Johns. 257, is, that whether trespass or case is the proper action, depends on the fact, whether the injury was immediate or consequential. But another principle is also recognized, viz., that if the injury is attributable to negligence, though it were immediate, the party injured has his election, either to treat the negligence of the defendant as the cause of action, and declare in case, or to consider the act itself as the injury, and to declare in trespass, as in *Blin v. Campbell*, *ub. sup.* See also *Turner v. Hawkins*, 1 Bos. & P. 472. In *Hall v. Pickard*, 3 Camp. 187, it was *held*, that if the owner of a horse lets him to hire for a time certain, during which he is killed by the owner of a cart driving it violently against him, the remedy of the owner of the horse is case and not trespass. But Lord Ellenborough, in this case, said: "It may be worthy of consideration, whether in those instances where trespass may be maintained, the party may not waive the trespass and proceed for the tort." Where A, through negligence and undesignedly, discharged a firelock in such a manner as to wound B, it was *held*, that B had his election to treat the negligence of A as the cause of the injury, and declare in case; or

to treat the act itself as the cause of the injury, and declare in trespass. *Dalton v. Favour*, 3 N. H. 465. See also, there cited, *Rogers v. Imbleton*, 5 Bos. & P. 117; *Harker v. Birkbeck*, 3 Burr. 1560; *Blin v. Campbell*, 14 Johns. 432; *Leame v. Bray*, 3 East, 600, 601. *Contra*, *Gates v. Miles*, 3 Conn. 64. But this case might as well have been decided for the plaintiff; and it is very probable that the fact, that the action of trespass was barred by the statute of limitations, induced the court to deny the remedy by an action on the case. Per Redfield J., in *Claffin v. Wilcox*, 18 Vt. 605. In this case it was *held*, that an action on the case might be sustained for an injury to the plaintiff's horse, which was injured by the great force by which it was struck by the improper and careless driving of the defendant's vehicle. The action on the case is altogether the most favorable for the defendant, because he can make a defence without the technicality of special pleading, and the plaintiff must recover a larger sum in trespass, in order to carry costs. There cannot be a doubt that a recovery in an action upon the case may be pleaded in bar to an action of trespass afterwards brought for the same injury. *Curia*, per Savage, J., in *M'Allister v. Hammond*, 6 Cow. 342. *Philadelphia R. v. Wilt*, 4 Whart. 143.

became permanently lame ; it was held, that case was a proper action.¹

§ 607. If an injury be inflicted on a child while living with, and in the service of, his father, he may maintain trespass ; but if at the time he be hired to, and in the service of another, trespass on the case is the proper remedy.² But where a child is of such tender age as not to possess sufficient discretion to avoid danger, and is permitted by his parents to be in a public highway, without any one to guard him, and is there run over by a traveller and injured, neither trespass nor case lies against the traveller, if there be no pretence that the injury was voluntary, or arose from culpable negligence on his part. Although the child, by reason of his tender years, is incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the parents or guardians of the child furnishes the same answer in respect to mutual negligence as would the omission of ordinary care on the part of the plaintiff in an action by an adult. (a) And, it seems, the same rule will apply in an action by a blind or deaf man, who under similar circumstances received an injury on a public highway.³ As an infant is personally liable for wrongs which he commits against the person or property of others,⁴ so, when he complains of wrongs to himself, the respondent has a right to insist that he should not have been the heedless instrument of his own injury.

§ 608. For an injury done to an infant, of the most tender age, by his being run over by a vehicle on the public highway, an action may be brought, in the name of the child, by his next friend.⁵ In respect to a very young child, the father, in England,⁶ can bring no action even for loss of service. (b)

¹ *M'Allister v. Hammond*, 6 Cow. 342.

² *Wilt v. Vickers*, 8 Watts, 227. See also *Flemington v. Smithers*, 2 Car. & P. 292.

³ *Hartfield v. Roper*, 21 Wend. 615.

⁴ *Bullock v. Babcock*, 3 Wend. 391, and the cases there cited.

⁵ In England, it seems, the action must be so brought, but whether it be so in New York, under the Revised Statutes, *quære*. *Hartfield v. Roper*, *ub. sup.*

⁶ *Hall v. Hollander*, 4 B. & C. 660, and cited more fully, *ante*, § 598.

(a) See *ante*, § 562.

(b) In *Alton v. Midland R.* 19 C. B. (N. S.) 213, it was held that an action will not lie against a carrier of passengers, by a master, for a personal injury sustained by the servant through the negligence of the carrier, whereby the

15. Rights of.

§ 609. Although a public carrier of passengers is under obligation to receive all persons, with their baggage, who apply for a passage, yet we have seen that this rule is subject to the carrier's right to provide for his own interests, by rejecting persons who apply, whose character can be reasonably objected to, or who refuse to comply with the carrier's reasonable regulations for the proper arrangement and conduct of his business, or who have for their object an interference with the carrier's business, and entertain the design of making it less lucrative to him.¹ As the carrier is under obligation to receive and carry all persons who are not thus objectionable, when they have room, so, on the other hand, he is entitled to be secure of his reward and compensation. He has, therefore, a right to demand his fare at the time the passenger engages his seat; and if the passenger refuses, his place may be taken by another.² (a) If a person takes a place in a conveyance, and pays at the time only a deposit, as half the fare, for example, and is not present and ready to take his place when the vehicle is setting off, the proprietor of the conveyance is at liberty to fill up his place with another passenger; but if at the time of taking his place he pays the whole fare, then the proprietor cannot dispose of the place, and the seat may be taken at any stage of the journey.³ In order to guard against fraud (as well as to secure the due payment of the fares), as well on the

¹ See *ante*, §§ 524-531.

³ *Ker v. Mountain*, 1 Esp. 27.

² 2 Steph. N. P. 984. Story on Bailm. § 603. *Ante*, § 531.

master lost the benefit of the services of the servant, the contract out of which arose the duty to carry safely being a contract between the carrier and the servant. This case was followed in *Fairmount R. v. Stutler*, 54 Penn. State, 375. In *Ames v. Union R. Co.* 117 Mass. 541, an action by a master for the loss of the services of his apprentice was sustained against a carrier through whose negligence the apprentice, while a passenger, was injured.

(a) It seems that a passenger on a railroad, who has forfeited his right to be carried farther by refusing to pay his fare, cannot regain the right by tendering his fare after the train has been stopped to put him off. *Hibbard v. New York R.* 15 N. Y. 455. See also *People v. Jillson*, 3 Parker, C. R. 234. So, if a passenger is put off the train for refusing to pay his fare, except by a ticket which is not good, he is not entitled to enter on presenting a good ticket. *State v. Campbell*, 32 N. J. 309.

part of the public as of their own servants, railway companies have invariably found it indispensable to adopt the ticket system, which requires fares in all instances to be prepaid; and tickets given to the passengers, which are considered as the sole vouchers for the payment of the fare, are collected from, or required to be exhibited by, the passengers, before they leave the trains or stations.¹(a)

¹ See *ante*, §§ 525, 530, n.

(a) A regulation allowing passengers purchasing tickets to ride for a less rate of freight than those who do not is valid, and a passenger may be ejected if he has not purchased a ticket and refuses to pay the higher rate. *Hilliard v. Goold*, 34 N. H. 230. *State v. Goold*, 53 Me. 279. *St. Louis R. v. South*, 43 Ill. 176. There is some question, however, whether the carrier can demand the higher rate if he does not provide reasonable facilities to a passenger for procuring a ticket. In Connecticut, two judges were of the opinion that no such obligation was imposed on the carrier, and two were of the opposite opinion. *Crocker v. New London R.* 24 Conn. 249. In Illinois it is *held*, that, if it is the fault of the carrier that the passenger has not a ticket, the higher fare cannot be demanded. *Chicago R. v. Parks*, 18 Ill. 460. See *State of Iowa v. Chovin*, 7 Iowa, 204; *Porter v. New York R.* 34 Barb. 353; *Nellis v. New York R.* 30 N. Y. 505; *Jeffersonville R. v. Rogers*, 28 Ind. 1. And a carrier has a right to charge higher fares to way stations than their proportion of the distance on a long route. If a passenger buys a through ticket, he has no right to get off at a way station and go on in another train. *State v. Overton*, 4 Zab. 435. *Johnson v. Concord R.* 46 N. H. 213. *Beebe v. Ayres*, 28 Barb. 275. But, in the absence of any restriction, if a person buys a ticket from A to B over one road, and a ticket from B to C over another, the fact that they are attached does not prevent him from remaining some time at B, and afterwards resuming his journey. *Brooke v. Grand Trunk R.* 15 Mich. 332. A rule or custom requiring passengers to surrender their tickets, and receive conductors' checks soon after starting, is valid. *Northern R. v. Page*, 22 Barb. 130. But a passenger is not obliged to surrender his ticket unless a check is tendered to him. *State v. Thompson*, 20 N. H. 250. See *People v. Caryl*, 3 Parker, C. R. 326; *Vedder v. Fellows*, 20 N. Y. 126; *Havens v. Hartford R.* 28 Conn. 69; *Cleveland R. v. Bartram*, 11 Ohio State, 457; *Dearden v. Townsend*, L. R. 1 Q. B. 10; *Jennings v. Great Northern R.* L. R. 1 Q. B. 7. A regulation requiring passengers to exhibit their tickets when called upon is reasonable and proper. *Hibbard v. New York R.* 15 N. Y. 455. See also *Woodard v. Eastern Counties R.* 1 Best & S. (Am. ed.) 977. *Ripley v. New Jersey R.* 30 N. J. 388. A conductor, in excluding a person from the cars, should use no more force than is absolutely necessary. *State v. Ross*, 2 Dutch. 224. *Coleman v. New York and New Haven R.* 106 Mass. 160. In Illinois, a passenger for non-payment of fare can only be put off the train at a regular station. *Chicago R. v. Flagg*, 43 Ill. 364. *Terre Haute R. v. Vanatta*, 21 Ill. 188. But the statute does not apply to the case of a refusal to surrender his ticket when called for, and in such a case he may be put off

The ticket obtained by a passenger, in connection with the established rules of a railroad company, a case in Massachusetts,¹ was treated in the light of a special contract. (a) By the rules of the company, the purchasers of tickets for a passage on the road, from one place to another, were required to go through in the same train; and passengers who were to stop on the road, and afterwards finish their passage in another train, were required to pay more than when they were to go through in the same train. A, not knowing these rules, purchased a ticket for a passage from D. to B., and entered the cars with an intention to stop at E., an intermediate place, and go to B. in the next train. When he took his ticket he was informed of the rule that required him to go through in the same train, and a check was given him, on which were the words, "good for this trip only." The conductor then offered to give back to A the money which he had paid, deducting the amount of his passage from D. to E., which A refused to accept, but demanded the ticket in exchange for the check. He stopped at E., went to B. on the same day, in the next train, and offered his check, which was refused, and he was obliged to pay the price charged for a passage from E. to B., and afterwards brought an action against the company for breach of contract. It was held that the action could not be maintained. (b)

¹ *Cheney v. Boston R.* 11 Met. 121. And see *ante*, § 530 c.

at any place not selected as dangerous or inconvenient. *Illinois Central R. v. Whittemore*, 43 Ill. 420. The case of *Terre Haute R. v. Vanatta* also decides that a passenger who, when asked for his fare, tenders only a ticket which is shown to be void by reason of a hole punched in it, and who offers no explanation, may be put off the train. A conductor has no right to put a passenger off a horse-railroad car when the car is in motion. *Sanford v. Eighth Av. R.* 23 N. Y. 343. This is *held* to be a question for the jury, in *Murphy v. Union R.* 118 Mass. 228.

(a) A ticket is not, however, considered so far a written contract as to preclude a passenger from proving by parol the contract made by him with the carrier. *Van Buskirk v. Roberts*, 31 N. Y. 661. See also cases cited, § 250.

(b) A person who buys a ticket of one road, which by an arrangement with another road authorizes him to go over such other road, is bound by the terms of the ticket, even though there is no evidence that he read them; and a ticket which bears on its face a printed statement, "Good only two days after date," ceases to be valid after the expiration of the two days. *Boston R. v. Proctor*, 1 Allen, 267. See also *Barker v. Coffin*, 31 Barb. 556; *Shedd v. Railroad Co.* 40 Vt. 88; *State v. Campbell*, 32 N. J. 309. The words, "good for this trip only," have been *held* not to relate to time, but to the journey, and that

§ 609 *a*. If the passenger carrier undertakes to convey persons without having been previously paid, the law presumes that he considers the possession of their baggage or luggage a security for his expected remuneration; and, agreeably to this presumption, he may detain the possession at the end of the transit, until he has received satisfaction. The carrier, in other words, has a lien upon the baggage or luggage of passengers; but not on their persons, or the clothes they have on.¹ (*a*) The general doctrine of lien, as applicable to the carriage of every description of property, has been largely discussed in a preceding chapter.² As to the carrier's right to the recovery of his fare after the possession of the baggage has been parted with, he is of course, in such event, compelled to have recourse to an action at law; for a person cannot have a lien upon any property, unless it is legally in his possession.³

¹ *Wolf v. Summers*, 2 Camp. 631, and *ante*, § 375.

² *Ante*, Chap. IX. §§ 357-391. That if A come wrongfully into possession of property which he delivers to a carrier or to an innkeeper, there is still a lien upon it, unless the carrier or the innkeeper knew that A was a wrongdoer, see *ante*, § 364-368. *Held*, in *Grinnell v. Cooke*, in New York, 3 Hill, 485, that if a traveller, having

wrongfully taken a horse, put up at an inn, and became a guest, the innkeeper, provided he had no notice of the wrong, may assert his lien on the horse, even as against the true owner. Of course the same doctrine is applicable to the delivery of baggage by a passenger in a public conveyance. See *Mason v. Thompson*, 9 Pick. 288.

³ *Ante*, §§ 376, 391.

although a passenger cannot, after he has commenced his journey, stop and claim to continue it on a subsequent day, yet that he can commence the journey on a subsequent day as well as on the day the ticket bears date. *Pier v. Finch*, 24 Barb. 514.

(*a*) In *Standish v. Narragansett Steamship Co.* 111 Mass. 512, it is *held* that a carrier may detain a passenger a reasonable time to inquire into the circumstances of the case, if he alleges that he has lost his ticket, and refuses to pay his fare; and that where a passenger loses his ticket the loss falls on him, and it is his duty to pay again. It is to be noticed, however, that in this case the ticket was the voucher, by which the carrier would recover the amount of another, to whom the money was alleged to be paid. See *Poulton v. London R. L. R.* 2 Q. B. 534. In *Hutchings v. Western R.* 25 Ga. 61, a passenger took with him into a railroad car a bag containing a large sum of money. The court *held* that he was bound to pay freight for its carriage, and that whatsoever was in the passenger car as baggage was so far in the constructive possession of the conductor as to authorize him to exercise the right of retainer for dues for freight on the article.

CHAPTER XII.

OF CARRIERS OF PASSENGERS BY WATER.

§ 610. THE peculiar character, in a legal point of view, of common carriers of passengers by water, renders it expedient that the subject of their duties and liabilities should be considered in a separate and distinct chapter. They are of course bound, like common carriers of passengers by land, to the utmost care and diligence on the part of themselves and their servants,¹ and for the sufficiency of their water-craft;² and their obligation in the latter respect, or, in other words, the duty of sea-worthiness, is analogous to the duty in respect to land-worthiness, of land carriers.³ But in cases of personal injuries on the voyage, and in cases of injuries occasioned by collision of vessels, where the service is the transportation of goods or passengers within the limits of tide-waters,⁴ (a) the admiralty court has jurisdic-

¹ See *ante*, §§ 523, 568 *et seq.*, § 540 *et seq.*

² See *ante*, § 539.

³ See *ante*, § 534 *et seq.*

⁴ See *ante*, § 419. That a court of admiralty has jurisdiction over marine torts, generally, see *ante*, § 420; and over wrongs committed by the master of a ship on a passenger on the high seas, *Chamberlain v. Chandler*, 3 Mason, 242. In that case there was a libel in the admiralty against the master of a ship for ill-treatment of certain passengers. No exception was interposed against the jurisdiction of the court; but Mr. Justice Story, in giving the opinion of the court, wished it to be understood that the point had not passed *sub silentio*, and that it had attracted the consideration

of the court; and he proceeded to say: "The contract itself is a maritime contract for the conveyance of passengers on the high seas, and the wrongs complained of are gross ill-treatment and misconduct in the course of the voyage, while on the high seas, by the master, in breach of the stipulations necessarily implied in his contract, of the duties of his office, and of the rights of the libellants, under the maritime law. The jurisdiction of courts of admiralty over torts, committed *in personam* on the high seas, has never, to my knowledge, been doubted or denied by the courts of common law, and has often been recognized by adjudications in the admiralty. 2 Browne, Adm. 108. 3 Bl. Com. 106. In 4 Inst. 134, the

(a) Admiralty jurisdiction does not now depend on tide-water. See *ante*, § 419, n.

tion,¹(a) and indeed that tribunal is the only one, under the dominion of the common law, which can administer a remedy *in rem* (which commences with the arrest of the vessel), and hold the vessel, whose master and crew have been in fault, liable for the payment of damages. (b) It is on this account that important questions of collision more frequently occur in courts of admiralty than in courts of common law, though they have

common-law judges admitted, in the fullest manner, that of contracts, pleas, and *querelas* made upon the seas, &c., the admiral hath and ought to have jurisdiction." The learned judge, in expounding the law in respect to admiralty jurisdiction in such cases as those in question, further asserted, that it made no difference, in point of principle, whether an injury to a passenger by the master be direct or consequential wrong, "whether it be an assault and imprisonment, or a denial of all comforts and necessities, whereby the health of the party is materially injured, or he is subjected to gross ignominy and mental suffering." The admiralty has been accustomed to deal with subjects of this nature from very early times. In the case of *The Ruckers*, 4 Rob. Adm. 73, a civil suit for damages was brought in the admiralty for an assault by the master of a ship on a passenger on the high seas, and, on full consideration, the jurisdiction was sustained. On that occasion the court directed the records to be searched, and the registrar reported "that many instances were found of proceedings on damage on behalf of persons described as part of the ship's company, against officers or others belonging to the same ship, and that there were other

instances of proceedings on the part of A. B. against C. D. without any specification of the capacity in which the persons stood." Sir William Scott said: "Looking to the locality of the injury, that it was done on the high seas, it seems to be fit matter for redress in this court." See also the elaborate opinions of several of the judges of the Supreme Court of the United States, upon the subject of admiralty jurisdiction, in the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344. See *Peyroux v. Howard*, 7 Pet. 324. Admiralty jurisdiction of the courts of the United States is not taken away because the courts of common law may have jurisdiction in a case within the admiralty. Nor is a trial by jury any test of admiralty jurisdiction. The subject-matter or service gives jurisdiction in admiralty; and locality gives it in tort or collision. In such cases happening upon the high seas, or within the ebb and flowing of the tide, as far up a river as the tide ebbs and flows, though it may be *infra corpus comitatus*, courts of admiralty of the United States have jurisdiction. *Waring v. Clarke*, 5 How. 441.

¹ Abbott on Shipp. (5th Am. ed.) 282 *et seq.*, 300 *et seq.*

(a) *The Moses Taylor*, 4 Wall. 411.

(b) In *The Hine v. Trevor*, 4 Wall. 555, the exclusive jurisdiction of the courts of admiralty in proceedings *in rem* was maintained, and State statutes authorizing such proceedings in the State courts in matters of admiralty and maritime jurisdiction were held to be unconstitutional. See also *The Moses Taylor*, 4 Wall. 411.

occurred in both. The admiralty jurisdiction also extends, in cases of collision, alike to foreign and domestic vessels, and whether both be foreign or both be domestic. In a case in the court of admiralty in England, between two foreign vessels, which had come into collision on the Kentish coast, an appearance was given under protest, denying the jurisdiction of that court, by the owners of one of them. The court held, that causes of collision were *communis juris*, and had no doubt of its jurisdiction to entertain the suit, and, if necessary, to compel security to be given for costs.¹

§ 610 *a*. The commercial intercourse between different States in this country by means of lake navigation having become extensive, and so important as to fall within the policy which dictated the extension of the federal judiciary to cases of admiralty jurisdiction, the act of Congress of February 26, 1845, (*a*) was passed, extending the jurisdiction of the District Courts to "certain cases upon the lakes and navigable waters connecting the same;" saving, however, to the parties, the right of trial by jury of all the facts put in issue in such suits, where either party shall require it; and saving, also, to the parties the right of a concurrent remedy at the common law where it is competent to give it; "and any concurrent remedy which may be given by the State laws, where such steamer or other vessel is employed in such business of commerce and navigation." With respect to the nature and extent of the jurisdiction conferred by the act in question, the act itself declares, that "the same jurisdiction in all matters of contract and tort, as is now possessed by the said courts (admiralty) in cases of the like steamboats and other vessels employed in navigation and commerce upon the high

¹ Abbott on Shipp. (5th Am. ed.) 314. The *Johann Friederich*, 1 W. Rob. 35.

(*a*) 5 U. S. Sts. at Large, 726. In *The Eagle*, 8 Wall. 15, it was held that the district courts have conferred upon them a general jurisdiction in admiralty upon the lakes and the waters connecting them by the act of 1789, and that the act of 1845 has become inoperative and ineffectual as a grant of jurisdiction. The court regard it as obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested, which is said to be rather a mode of exercising jurisdiction than any substantial part of it. This decision is commented on in 4 Am. Law Rev. 673.

seas or tide-waters within the admiralty and maritime jurisdiction of the United States; and in all suits brought in such courts, in all such matters of tort and contract, the remedies and forms of process, and the modes of proceeding, shall be the same as are, or may be, used by such courts in cases of admiralty and maritime jurisdiction; and the maritime law of the United States, as far as the same may be applicable thereto, shall constitute the rule of decision in such suits.”¹ (a) The act appears to be limited in its terms to commerce and navigation, carried on between different states and territories, and thus appears not to embrace cases arising out of the commercial intercourse between American ports and the neighboring British dominions; unless these dominions should be adjudged to have been intended by the term “territories.”

§ 611. It is proposed to consider, first, the duties and liabilities of common carriers of passengers by water, in respect to the treatment, accommodation, &c., of the passengers, as those duties and liabilities have been the subjects of adjudication under the jurisdictions of the common law and of the admiralty; (b) and secondly, the rules established under each jurisdiction, which furnish grounds of responsibility or excuses for damage, in case of accidents which have arisen from improper navigation and collision of vessels.

§ 612. First. The frequent and increasing intercourse by water between different portions of the extensive territory of the United States, and the present very great extent of the intercourse between the United States and distant foreign countries, have rendered that branch of the law which relates to passenger ships and vessels of the utmost importance. That it is the duty, as a general rule of law, of the owners and masters of vessels, who hold themselves out as carriers of passengers, to receive all

¹ Conkling on Admiralty Jurisdiction, &c. And see *post*, § 641, n.

(a) See *The Hine v. Trevor*, 4 Wall. 555, for a review of the cases under this statute.

(b) The obligation of the carrier ceases on the termination of the voyage; and therefore, if a contagious disease breaks out on a vessel during the voyage, and on her arrival the city authorities send the passengers to the hospital, the owners of the vessel are not liable to the city for the expense thereby incurred. *New Orleans v. Ship Windermere*, 12 La. Ann. 84.

persons who apply for a passage, provided they are unexceptionable in character, &c., and the fare be tendered, we have shown to be unquestionable.¹ In this respect there is no difference between carriers of passengers by water from one place to another in the same country and carriers of passengers beyond the seas. In a late action on the case in England,² the question directly arose, whether a man could be a common carrier of passengers from a place that is within, to a place that is without, the realm; that is, whether or not the defendants were common carriers of passengers for hire from Southampton, in England, to Gibraltar, in Spain. It appeared on the trial before Wild, C. J., at the sittings, that the defendants were the proprietors of certain steam-vessels, one of which was advertised, by circulars issued by the defendants, to sail every ten days from Southampton for Corunna, Vigo, Oporto, Lisbon, Cadiz, and Gibraltar, — the circulars giving the times of starting, and the terms upon which passengers were to be conveyed to those places respectively, and goods also, if there was room for them; that the plaintiff went to Southampton for the purpose of taking his passage by the “Montrose,” the name of one of the defendants’ vessels; but that, in consequence of some communication which had been made to the defendants by the Portuguese consul, their agent refused to allow him to take a passage, although it was admitted that there was plenty of room. It was submitted, on the part of the defendants, that the common-law liability of carriers did not extend to carriers of passengers, or to extra-territorial carriers; and that the company’s circulars imported a limited and not a general undertaking to carry passengers. The learned judge left it to the jury to decide whether or not there was evidence to induce them to believe that the defendants carried on the business of common carriers for hire; and the jury found in the affirmative. Upon leave being given to the defendants to move to enter the verdict for them, if the court should be of opinion that this was not the fair legal inference from the evidence; it was held, that the question was properly left to the jury, and properly found by them; and that the declaration of the plaintiff, when it calls the defendants “common carriers of

¹ *Ante*, § 525 *et seq.*

² *Bennett v. Peninsular Steamboat Co.* 6 C. B. 775.

passengers," did not mean to allege that they were carriers within the realm, and according to the custom of the realm, but that they were persons who were in the habit of conveying passengers for hire, from England to certain places beyond the seas.¹ And every person taking passage is presumed to contract, in respect to accommodations, &c., during the voyage (in the absence of a special agreement), in reference to the usage of the particular voyage.² In all cases of commercial usage, the law presumes that the parties contracting did not mean to commit to writing the whole of their contract by which they intended to be bound, but that they contracted on the understanding that established usage should explain what is left doubtful.

§ 613. In an action against the captain of a ship for not furnishing good and fresh provisions to a passenger on a voyage, Lord Denman said, in his address to the jury: "I think the result of the evidence is, that the captain did not supply so large a quantity of food and fresh provisions as is usual under such circumstances. But there is no real ground for complaint, no right of action, unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had, that he has, therefore, a right of action against the captain, who does not provide all that he ought: you must be satisfied that there was a real grievance sustained by the plaintiff."³

§ 614. In the case of an express contract between a passenger and the master, the rights of the parties will of course be governed by its terms; for any commercial usage, however well established, can be of no efficacy to defeat the plain meaning expressed by the parties. There have been several cases at common law of particular contracts in respect to a passage by sea, of the use of which we shall here avail ourselves, as they have been collected and set forth by Lord Tenterden, in his valuable treatise on the law relative to merchant-ships, &c.⁴

§ 615. In an action against the defendant,⁵ master of an East-Indiaman, about to sail from Calcutta, on a voyage to London, the defendant, by an agreement under seal, granted and let to the plain-

¹ See *ante*, §§ 87, 88.

⁴ Abbott on Shipp. *ub. sup.*, 284

² *Ante*, § 533. Abbott on Shipp. *et seq.*
(5th Am. ed.) 284.

⁵ Corbin v. Leader, 10 Bing. 275.

³ Young v. Fewson, 8 Car. & P. 55.

tiff the whole of the cabins and accommodations fitted up for the reception, convenience, and conveyance of passengers on board the ship, and the defendant covenanted to promote, as far as in him lay, the comfort and convenience of the plaintiff and such persons as he should engage and contract with, and who should be received as passengers in and on board the said ship; in consideration whereof, the plaintiff covenanted with the defendant, among other things, to pay the defendant the sum therein agreed on; and that he would in every respect support and uphold the authority and command of the defendant, and in no way interfere with the management or navigation of the ship, or with the affairs thereof. The plaintiff further covenanted, that if in the progress of the voyage it should be necessary, for the convenience and at the request of the plaintiff, to touch or put into any other intermediate port or ports, save and except St. Helena, he would bear and pay all port and other necessary charges which might be incurred thereby. The court held, that this stipulation, as to the payment of the charges of touching at an intermediate port, thus interwoven with the covenant of the defendant, clearly showed that stopping in the course of the voyage was a thing contemplated by the parties, as conducive to the convenience of the passengers, and that the defendant was bound so to stop at the request of the plaintiff, unless it would have interfered with the safety of the vessel.

§ 616. In an action of assumpsit, by the master of an East-Indiaman against a lieutenant in the company's service, who had been his passenger on a voyage from Madras to London, it appeared that by an order of the Court of Directors, officers of that rank were to pay one thousand rupees, and no more, for "their passage, and accommodation at the captain's table," and this sum was paid into court. For the plaintiff it was contended, that the defendant, for the regulation price, was only entitled to swing his cot in the steerage, and that he had been allowed a cabin to himself, for which the additional payment was required. Evidence having been given, that during the voyage no officers slept in the steerage, and that the defendant's cabin would have remained empty had he not occupied it, Lord Ellenborough was of opinion that there was nothing to raise an implied promise to pay more than the regular sum.¹

¹ *Adderley v. Cookson*, 2 Camp. 15.

§ 617. The case of *Gillan v. Simpkin* was an action for money had and received, to recover passage-money paid to the defendant, as master of a ship, in which he had agreed to carry the plaintiff as a passenger to Antigua. The plaintiff, who had paid the money before the commencement of the voyage, had intended to have gone on board at Portsmouth, but the luggage was shipped in the river Thames, and in proceeding round from thence to Portsmouth, the ship was lost. It appeared in evidence, that it is usual for the passage-money to be paid in London, and that the stores for the use of the passengers were always put on board in the river. Chief Justice Gibbs, in his direction to the jury, said: "If the money had been to be paid at the end of the voyage, the defendant could not have recovered any part of it, there being an entire contract to carry the plaintiff from London to Antigua. But if the voyage was commenced, and the ship was prevented from completing it by perils of navigation, the captain may be entitled to retain the passage-money previously paid to him. The contract for this purpose may either be express or may be evidenced by established usage. Here it is proved, that in West India voyages the passage-money is paid before the voyage commences, and it does not appear to be returned, although the voyage is defeated. On the other hand, if the ship were lost before the commencement of the voyage, for which these parties had contracted, the money paid by anticipation must be returned."¹

§ 618. The master of a vessel sought to recover damages from the defendant for the breach of a verbal agreement, by which he engaged two cabins on a voyage from England to Madras for a certain price. He refused to go, because the vessel, which was to have left the docks by the 10th of October, did not. It was proved to be the rule of the East India trade, that when a passenger refused to go, in consequence of a delay in the sailing of a vessel, he was to forfeit half the amount of the passage-money agreed for. The ship did not leave the docks until the 21st of October. "Chief Justice Tindal directed the jury to find for the plaintiff, with half the passage-money as damages, if they thought that the time of sailing was matter of representation, but not an essential

¹ *Gillan v. Simpkin*, 4 Camp. 241. And see *Leeman v. Gordon*, 8 Car. & P. 392.

part of the contract, and that, under the circumstances, the ship had sailed within a reasonable time.”¹

§ 619. In an earlier case, in which the plaintiff sought to recover passage-money on an implied assumpsit *pro ratâ itineris peracti*, it appeared that he had contracted to carry the defendant, his family and luggage, from Demerara to Flushing, and that in the course of the voyage, and within four days’ sail of Flushing, the ship was captured by an English ship of war, and brought to England. The ship and cargo were libelled in the court of admiralty, and proceedings were pending against the ship, but the defendant and his family were liberated, and his luggage restored to his possession. The court was of opinion, that, if the ship had been restored, the action might have been maintained, but that, as the result of the proceedings in the court of admiralty might be the condemnation of the ship, and decree of her freight to the captors, it was premature, while that suit was pending.²

§ 620. The executors of an East India captain, who had died in the East Indies before the commencement of the homeward voyage, brought an action against the chief mate of his ship, on whom the command had devolved, to recover the amount of the sum he had received from the passengers brought home in the ship, for their passage and entertainment during the voyage. It was contended, for the plaintiff, that the passage-money must belong to the representatives of the captain; for the defendant, that he was entitled to the whole, because he had the actual command during the voyage. “If,” said Mr. Justice Bayley, “there be no usage on the subject, I think the law is, that where the captain has contracted to carry passengers, and dies, his representatives are entitled to the benefit of the contract, and may maintain an action for the passage-money. If the mate lays out money in purchasing stores for such passengers, he is the agent of the representatives for that purpose, and may oblige them to repay him. But where, after the death of the captain, the mate contracts to carry passengers on the homeward voyage, he is himself entitled to the benefit of the contract, and may retain the whole of the

¹ Yates v. Duff, 5 Car. & P. 369. also, as to the right of a passenger to be carried to the end of the voyage,

² Mulloy v. Backer, 5 East, 316, *ante*, § 532.
cited more fully *ante*, § 392, n. See

passage-money. If for the entertainment of such passengers he has any part of the stores laid in by the captain, for so much he must account to the captain's representatives."¹

§ 620 *a*. Where carriers of passengers agree to transport a person from one place to another, by a particular vessel, which vessel, without the knowledge of either party, is a total wreck at the time, so that the performance of the engagement is impossible, the only obligation resting on the carriers is to return to the other party the money paid by him, with interest, upon a consideration which has failed. The plaintiff must confine himself to the breach specially alleged, and cannot recover upon any other grounds.² (*a*)

§ 621. The master or captain of a ship is regarded as an officer, to whom great power, momentous interests, and enlarged discretion are from necessity confided; and the situations of unforeseen emergency, in which he may be compelled to exert himself for the preservation of the life and property with which he is intrusted on the voyage, render it necessary that he should be invested with large, and, for the time at least, unfettered authority. Obedience to this authority, in all matters within its scope, is a duty which is expected to be discharged by every passenger. On the other hand, it is his duty to attend to the preservation of the health and comfort of the crew and passengers, as well as for the safety of the vessel and cargo.³ In respect of passengers, the case of the master is one of peculiar responsibility and delicacy, and their contract with him is a stipulation, not for toleration merely, but for respectful treatment, and for that decency of demeanor, which constitutes the enjoyment of social life; "for that attention, which mitigates evils without reluctance, and

¹ *Siordet v. Brodie*, 3 Camp. 253.

² 3 Kent, Com. 158. *Abbott on Shipp.* (5th Am. ed.) 152, n. 218,

³ *Briggs v. Vanderbilt*, 19 Barb. 222. See *Holmes v. Doane*, 3 Gray, 328.

282. See *Steamboat New World v. King*, 16 How. 469.

(*a*) *Bonsteel v. Vanderbilt*, 21 Barb. 26. In *Williams v. Vanderbilt*, 29 Barb. 491, a contract was made to carry a passenger from New York to San Francisco. At the time the contract was made, a vessel, which formed part of the line, had been lost. *Held*, that the carrier was bound to provide another with all reasonable diligence. This case was affirmed in 28 N. Y. 217, and the cases of *Briggs* and *Bonsteel* were overruled.

that promptitude, which administers aid to distress.”¹ The stipulation in respect to females, says Mr. Justice Story, in the case just referred to, proceeds yet further; “it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of feeling, which aggravates every evil, and endeavors by the excitements of terror, and cool malignancy of conduct, to inflict torture upon susceptible minds.”² In *Chamberlain v. Chandler*, in the admiralty,³ the libellants were husband, wife, and children, who were passengers on board ship, on a voyage from Woakoo to Boston. The libel was against the defendant as master of the ship, for damage for alleged ill-treatment and injuries to them during the voyage. The evidence is not given in the case, but, upon a full examination of it by Mr. Justice Story, he came to

¹ Per Story, J., in *Chamberlain v. Chandler*, 3 Mason, 242. In a case in the Circuit Court of the United States for the District of Massachusetts, the vessel had sailed from Cork with a large number of passengers, ostensibly destined for Quebec; but on approaching the American coast, the passengers insisted upon being landed at New York or Philadelphia, alleging that they had contracted with the charterer to be carried to one of those ports. The master refusing to comply with their request, they rose upon him, drove him down into the cabin with violence and threats, and, having compelled the mate to take an oath that he would carry the vessel into one of the above-mentioned American ports, or into Boston, put him in command. One of the crew of a fishing vessel was afterwards engaged to pilot the schooner into Boston; and, having performed the service, he instituted a suit in the admiralty against the schooner to recover compensation. His demand was resisted, on the ground that he came on board the vessel at the request of the mate and passengers, who, it was insisted, had no authority to bind her, and that

he must, therefore, look to them for remuneration; and so the court decided. The Ann, 1 Mason, 508.

² It was intimated, said the learned judge, that such acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, and the acts do not amount to an assault and battery, they are not to be redressed. His opinion was, that the law involved no such absurdity; “and the law,” said he, “gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by direct, or of consequential, injuries. In each case, said he, the contract of the passengers for the voyage is in substance violated; and the wrong is to be redressed as a cause of damage. He did not say, that every slight aberration from propriety or duty, or that every act of unkindness or passionate folly, is to be visited with punishment; but if the whole course of the conduct be oppressive and malicious, if habitual immodesty is accompanied by habitual cruelty, it would be a reproach to the law if it could not award some recompense.”

³ *Ub. sup.*

the conclusion that the libel was sufficiently proved to entitle the libellants to damages.¹ (a)

§ 622. The treatment of the passenger, due from the master, depends in a great degree upon the passenger's conduct and behavior during the voyage.² Conduct in a passenger in a ship on the ocean, which is unbecoming a gentleman, in the strict sense of the word, will, it seems, justify the captain in excluding such passenger from the cuddy table, whom he has engaged by contract to provide for there; though it is difficult to define what degree of indecorum would, in point of law, warrant such exclusion. It is, however, clear, that if a passenger use threats of personal violence towards the captain, the captain may exclude him from the table, and require him to take his meals in his own private apartment. If the husband be excluded, and the wife, not from compulsion, but from a wish to be with her husband, take her meals with him in private, this will not amount to a breach of contract on the part of the captain, so far as regards the wife. In this case,³ the action was brought by the plaintiff, a captain in the army, against the defendant, the captain of the ship "Bolton," to recover damages for the breach of a contract, by which he undertook to convey the plaintiff and his wife, as cuddy passengers, on a voyage from Madras to England. The plaintiff's complaint consisted of three particulars: first, that the defendant did not treat him and his wife as cuddy passengers; secondly, that he did not provide good and sufficient meat, drink, &c.; and,

¹ And he accordingly decreed, that the defendant should pay \$400 damages (being the amount of his share of the passage-money received for the passage of the libellants) and costs of suit.

² *Ante*, §§ 532, 533.

³ *Pendergast v. Compton*, 8 Car. & P. 454.

(a) See *McGuire v. Steamship Golden Gate*, 1 McAll. 104. Common carriers by water are liable for an assault and battery committed by their steward and waiters on a passenger, upon his interference by a proper remark with their rude treatment of his relative, a fellow-passenger, in reference to his paying for a meal taken on the vessel. *Bryant v. Rich*, 106 Mass. 180. In *Ellis v. Narragansett Steamship Co.* 111 Mass. 146, it is *held* that the officers of a steamboat have the right to reserve a table for their own use, and that if a passenger takes a seat at such a table and refuses to leave and take a seat at another table, force may be used to remove him, even if it was not necessary to keep the table for the officers.

thirdly, that he excluded him from the cuddy, and from walking on the weather-side of the ship. Tindal, C. J., in summing up, said: "With respect to the second ground of complaint, there is scarcely enough to justify any charge; and as, on the side of the plaintiff, some things have been thought of that would never have been thought of if no other ground of complaint had existed; so, on the other side, many things have been introduced which, under other circumstances, never would have been referred to. Therefore, I think, you may consider the question upon the first and third grounds, which seem very much to stand upon the same footing, the unfitness of the plaintiff to associate with the other passengers. The question for you is, whether the defendant has shown that he had a good cause of justification for the exclusion of the plaintiff from the cuddy, and from certain parts of the deck. The plaintiff complains, that his wife also was excluded from the cuddy, but in fact she was not excluded, except so far as a proper feeling on her part would lead her to remain with her husband. The defendant rests his defence on three distinct grounds, all of which he says operated on his mind at the time. First, he says that the conduct of the plaintiff was vulgar, offensive, indecorous, and unbecoming. There is some evidence that he was in the habit of reaching across other passengers, and of taking broiled bones with his fingers. It would be difficult to say, if it rested here, in what degree want of polish would, in point of law, warrant a captain in excluding a passenger from the cuddy. Conduct unbecoming a gentleman, in the strict sense of the word, might justify him; but in this case there is no imputation of the want of gentlemanly principle. The second ground on which the defendant relies is, the incident which took place on the 19th of July. The conversation on that occasion seems substantially to be proved by the different witnesses, as it is stated in the plea, and one cannot help thinking, from all the circumstances of the case, that this was the motive operating on the defendant's mind. The third ground is, the threat used by the plaintiff, that he would cane the defendant. But it does not seem to me that the threat was heard by the defendant before he gave the order for the exclusion of the plaintiff from the cuddy. I do not see, upon the evidence, that it was, but it is for you to say. It is important to consider this, as, if it did operate on the mind of the defendant

at the time of the exclusion, I cannot conceive that such conduct would not justify that exclusion. A man who had threatened the commanding officer of the ship with personal violence would not be a fit person to remain at the table at which he presided. If the whole of the defendant's justification is made out, you will find your verdict for him. If it is not made out, you will find your verdict for the plaintiff, and give him such damages as you think he is entitled to receive."¹

§ 623. Whatever is necessary for the security of the vessel, the discipline of the crew, the safety of all on board, the master may lawfully require, not only of the ship's company, who have expressly obligated themselves to obey him, but of those also whom he has engaged to carry to their destination, on the implied condition of their submission to his rule. But the exercise of power thus undefined must, at the master's peril, be restricted to the necessity of the case; and on the ground of such necessity, and within its limits, he may enforce and justify orders, which would otherwise expose him to censure, to civil responsibility, and to punishment.² A passenger who is found on board in time of danger is bound, at the master's call, to do works of necessity in defence of the ship, if attacked, and for the preservation of the lives of all on board.³ Yet, as he may lawfully, except under peculiar circumstances, leave the ship, should he voluntarily remain at the risk of his personal safety to assist in distress, he may be entitled to remuneration for his service.

§ 624. In an action of assault and false imprisonment on board an East-Indiaman, in a voyage from Bombay to Calcutta, it appeared that the plaintiff was a passenger in the gunner's mess, and that the defendant was captain of the ship. Near the Cape of Good Hope, two strange sail were descried in the offing, supposed to be enemies. The defendant immediately mustered all hands on deck, and assigned to every one his station. The plaintiff, with the other passengers, he ordered on the poop, where they were to fight with small arms. This order all readily obeyed, except the plaintiff, who, conceiving he had been ill-used by the

¹ Verdict for the plaintiff; damages £25. See *Noden v. Johnson*, 16 Q. B. 218; 2 Eng. L. & Eq. 201.

² 3 Kent, Com. 183. Abbott on Shipp. (5th Am. ed.) 282.

³ *Newman v. Walters*, 3 Bos. & P. 612.

defendant some time before, in being forbidden to walk on the poop, positively refused to go there, but offered to fight in any other part of the ship with his messmates. The defendant, for this contumacy, ordered him to be carried upon the poop, and there kept him in irons during the whole night. Next morning no enemy appeared, and the ship arrived safe at St. Helena, where the plaintiff quitted her. Lord Ellenborough at first said that he did not know that the confinement of the plaintiff was not necessary, and therefore justifiable; but when it came out that he had been kept all night in irons on the poop, he clearly held that the defendant had exceeded the limits of his authority.¹

§ 625. The master of a vessel who undertakes to convey passengers for a reward is of course bound to carry them safely to the end of the voyage, and to this end it is incumbent upon him, as we have seen, to exercise the utmost care;² but no evidence can be given of a specific act of negligence which is not the foundation of a suit. In an action for negligently steering a ship, whereby she was wrecked, and the plaintiff lost his passage in her, the first count in the declaration stated, that the defendants were the owners of the ship A., and that the plaintiff took his passage in that ship from Madras to London, and paid his passage-money; and that it became the defendant's duty to convey him safely; yet that, by reason of the negligence of the defendants and their servants, the ship was wrecked; and that the plaintiff was injured by having to pay a passage in another ship, and was delayed for the same. An officer in the navy, who was a passenger in the A., was called to prove the negligence of the captain and crew. He was proceeding to state their negligent conduct at an earlier part of the day on which the accident happened, but Abbott, C. J., held, no evidence could be given of a specific negligence which was not the ground of the plaintiff's action. The witness was then asked who had the charge of the watch at the time the ship was wrecked, and he stated that it was the second mate; and that he had, both before and after the wreck, heard the captain say that the second mate was wholly incompetent to have the charge of the watch.³ Objections being

¹ *Boyce v. Bayliffe*, 1 Camp. 58.

² See *ante*, §§ 540, 541, 542.

³ *Ante*, §§ 523, 568. See *ante*, § 532.

made to these statements of the captain being received in evidence, the learned judge said he must receive the evidence: the captain, he said, "leaves the ship in the charge of a person he himself considers incompetent; this is certainly evidence of negligence on his part." Evidence was given, that, for some hours before the wreck, the ship was within a bay, and no soundings were made, nor lookout kept; which evidence was confirmed by many witnesses. Evidence was also given of the expense and loss incurred by the plaintiff in consequence of the wreck. A witness was then called, who stated he had been a master in the navy for seventeen years, and the plaintiff's counsel wished to ask him, as a man of experience in nautical matters, whether, supposing the facts as proved to have occurred, they showed negligence in the captain. This was objected to; but the learned judge held, that the plaintiff's counsel might state to the witness what had been done, and might ask him if a man of competent skill would have done so. The defence was, that there was no negligence; and to prove this the captain, chief mate, and some of the crew (having been released)¹ were called. The question of negligence, or no negligence, was left to the jury, and they gave a verdict for the plaintiff.²

§ 626. In England, Parliament has, by various statutes applicable to different voyages, interposed to protect unwary emigrants from the fraud and cupidity of unprincipled ship-owners.³ (a) Besides security for the seaworthiness of the ship, those statutes provide for a due proportion between her tonnage and the number of her passengers.

In the United States, by an act of Congress of 2d March, 1819, c. 46, (b) it is provided: "§ 1. That if the master, or other person on board of any ship or vessel, owned in the whole or in part by a citizen or citizens of the United States, or the territories thereof, or by a subject or subjects, citizen or citizens, of any foreign country, shall, after the first day of January next, take on board

¹ See *ante*, § 469.

² *Malton v. Nesbit*, 1 Car. & P. 70.

³ *Abbott on Shipp.* (5th Am. ed.) 283, 289 *et seq.* See *The Two Friends*,

1 Rob. Adm. 285; *The Beaver*, 3

Rob. Adm. 292; *The Joseph*, 1 Rob.

Adm. 306, cited in *Abbott, supra*.

(a) *Ellis v. Pearce*, Ell. B. & E. 431.

(b) 3 U. S. Sts. at Large, 488.

of such ship or vessel, at any foreign port or place, or shall bring or convey into the United States, or the territories thereof, from any foreign port or place ; or shall carry, convey, or transport, from the United States, or the territories thereof, to any foreign port or place, a greater number of passengers than two for every five tons of such ship or vessel, according to custom-house measurement ; every such master, or other person so offending, and the owner or owners of such ship or vessel, shall severally forfeit and pay to the United States the sum of one hundred and fifty dollars for each and every passenger so taken on board of such ship or vessel, over and above the aforesaid number of two to every five tons of such ship or vessel ; to be recovered by suit in any Circuit or District Court of the United States, where the said vessel may arrive, or where the owner or owners aforesaid may reside ; provided, nevertheless, that nothing in this act shall be taken to apply to the complement of men usually and ordinarily employed in navigating such ship or vessel. § 2. That if the number of passengers so taken on board of any ship or vessel as aforesaid, or conveyed or brought into the United States, or transported therefrom as aforesaid, shall exceed the said proportion of two to every five tons of such ship or vessel, by the number of twenty passengers in the whole, every such ship or vessel shall be deemed and taken to be forfeited to the United States, and shall be prosecuted and distributed in the same manner in which the forfeitures and penalties are recovered and distributed under the provisions of the act entitled ‘ An Act to regulate the collection of duties on imports and tonnage.’ ”

§ 627. To subject a vessel to forfeiture according to the provisions of the above act, there must be an excess of twenty passengers beyond the proportion of two to every five tons of the vessel ; and in estimating the number of passengers under the act, no deduction is to be made for children, or persons not paying ; but those employed in navigating the vessel are not to be included.¹ In reply to the argument urged in the case just referred to, that children, especially those of a very tender age, and all non-paying passengers, are not within the object of the law, and the evil to be prevented by it, and therefore could not be taken to be a part of the number of passengers to be allowed

¹ United States v. The Louisa Barbara, Gilpin, 332.

by the law, Judge Hopkinson said: "If we were to make these deductions of children and unpaid persons on board of a vessel from the number of her passengers, we should find no warrant for it in the law, and throw the construction of the act into such uncertainty as would render it little better than a nugatory attempt at legislation. In regard to children, we should be obliged to fix the age at which they might not be considered as passengers within the act, and the question of payment would often be as difficult to settle. The inconvenience to health and life from crowded vessels is the same, whether the persons on board pay or do not pay their passages; and although it may not be probable that the owners of vessels will bring passengers for nothing, yet the law may be evaded and defeated by secret artifices and agreements on the subject of compensation for the passage, if it is to be understood that paying passengers only are within the law. The payment would thus become a part of the case of the prosecution; and legal proof would be required of it." In estimating the tonnage of a vessel bringing passengers from a foreign country, the measurement of the custom-house, in the port of the United States at which the vessel arrives, is to be taken.¹

§ 628. The above-mentioned act of Congress also provides, that every vessel bound on a voyage from the United States to any port on the Continent of Europe, at the time of leaving the last port whence such vessel shall sail, shall have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted provisions, one gallon of vinegar, and one hundred pounds of wholesome ship bread, for each and every passenger on board of such vessel, over and above such other provisions, stores, and live stock, as may be put on board by such master or passenger for their use, or that of the crew; and in like proportion for a shorter or longer voyage. And if the passengers on board of such vessel in which the proportion of the provisions directed shall not have been provided shall at any

¹ United States *v.* The Louisa Barbara, Gilpin, 332. In England, a list of passengers is to be delivered, before clearing, to the collector, or other chief officer of the customs, at such port or place as may clear the

ship, and a list also of additional passengers, after clearing out. Abbott on Shipp. 292. A similar provision exists in the act of Congress of 2d March, 1819, ch. 46, § 4.

time be put on short allowance in any of the articles enumerated, the master and owner of such vessel shall severally pay to each and every passenger, who shall have been put on short allowance, the sum of three dollars for each and every day they may have been on such short allowance. The penalty to be recovered in the same manner as seamen's wages are or may be recovered.

§ 628 *a*. A later act of Congress, of 1847, limits the number of passengers to be taken on board vessels owned by citizens of the United States, or by those of any foreign country, at any foreign port, in proportion to the space occupied by them and appropriated for their use, and unoccupied by stores or other goods, where the intent is to bring such passengers to the United States; and the act extends, also, to the taking of passengers on board within the jurisdiction of the United States; and likewise provides for the arrangement, construction, and dimensions of the berths.¹ A still later act, of 1848, was passed for the proper ventilation of passenger vessels, prescribing also the quantity of provisions and water, and in amendment of the first section of the act last before mentioned.² And again, in 1849, was an act passed extending the provisions of laws then in force relating to the carriage of passengers.³ (*a*)

§ 629. The safety of passengers on board of steam-vessels has also been the subject of studied legislation by Congress; and it has been a duty imposed by Congress upon the district judge, within whose district there are ports of entry or delivery, upon the application of the master or owner of any vessel propelled by steam, to appoint one or more competent persons to make inspection of such vessels, and of the boilers and machinery; and the inspectors are to give certificates of their inspection, as enjoined

¹ C. 16, 9 U. S. Sts. at Large, 127. 399. See Am. Law Reg. for May,

² C. 7, 9 U. S. Sts. at Large, 210. 1854, pp. 421, 422, and Law Rep. for

³ C. 111, 9 U. S. Sts. at Large, April, 1851.

(*a*) All these acts have been repealed, and the subject-matter of them covered by act of 1855, c. 213, 10 U. S. Sts. at Large, 715. Some of the provisions of this act are changed by the act of 1864, c. 249, §§ 1, 2, 9, 13 U. S. Sts. at Large, 390. In the *Brig Candace*, U. S. D. C. Mass., 1867, Lowell, J., held that the 15th section of the act of 1855, making the penalties a lien on the vessel, referred to the penalties imposed by sections 2d and 8th, and not to the fines imposed by the 1st and 6th sections. The law now in force is U. S. Rev. Sts. §§ 4252-4277.

by the act. The most important provision of the laws referred to, and one well intended to secure the end in view, is, that the captain, engineer, pilot, and all other persons employed on board steam-vessels, by whose misconduct or inattention the life of any person on board may be destroyed, shall be deemed guilty of manslaughter. But for this, and many other provisions of importance to the public, and to the owners, masters, and engineers of steam-vessels, which are intended to secure the safety of all persons taking passage in steam-vessels, the reader is referred to the acts of Congress on the subject. (a) The safety of passengers by steam-vessels has also received the attention of the legislature of the State of New York, who have passed an act requiring steam-boats, or vessels driven by steam, navigating the waters of that State, to carry small boats for the protection of life in case of accident; and every violation of the provisions of the act is made punishable by fine not less than two hundred and fifty dollars, recoverable against the captain of the boat or vessel, or the owner or owners of either of them.¹

§ 630. In the construction of a State law in New York,² it has been held, that in passing the Erie and Champlain Canals, freight boats are bound to afford every facility for the passage of packet boats, as well through the locks, as elsewhere on the canal. And where a freight boat passing on the Erie Canal was waiting for the emptying of a lock, when a packet boat overtook her, it was held that the packet boat should pass first. On request, the master of the freight boat, refusing to consent to this, the master of the packet may use all necessary means to obtain the preference due to him, short of a breach of the peace; as, by pulling back the freight boat, and forcing his own forward, doing no unnecessary damage to the freight boat. Should the freight boat be detained or injured, through the obstinate resistance of the master to the exercise of the right of preference of the packet, this is the fault of the former, for which he cannot recover damages against the master of the latter.³

¹ Hunt's Merchants' Mag. for June, 1849, p. 656.

² Of April 30, 1820, sess. 43, ch. 202, §§ 4 and 10.

³ Farnsworth v. Groot, 6 Cow. 698. For the construction of the by-laws of a village, regulating wharves and basins on the Erie Canal, see Larned v. Syracuse, 5 Wend. 166.

(a) See U. S. Rev. Sts. §§ 4399-4500.

§ 631. On many occasions the important question, whether certain State laws conflicted with the power of Congress to regulate commerce, has been agitated and decided; (a) and among the instances of that kind which have occurred, there are two which relate to passengers brought to our shores in vessels from abroad. By one of the provisions of a law passed by the legislature of the State of New York,¹ the master of every vessel arriving in New York from any foreign port, or from a port of any of the States of the United States, other than New York, is required, under certain penalties prescribed in the law, within twenty-four hours after his arrival, to make a report in writing, containing the names, ages, and last legal settlement of every person who shall have been on board the vessel commanded by him during the voyage; and if any of the passengers shall have gone on board any other vessel, or shall, during the voyage, have been landed at any place with a view to proceed to New York, the same shall be stated in the report. The corporation of the city of New York instituted a suit (an action of debt) under that law against the master of a ship, for the recovery of certain penalties, imposed by the act, on the ground that he did not report as required. The Circuit Court were divided in opinion on the following point, which was certified to the Supreme Court of the United States: "That the act of the legislature of New York assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void." The Supreme Court directed it to be certified to the Circuit Court of New York, that so much of the section of the act of the legislature of New York as applied to the breaches set forth, did not assume to regulate commerce between the port of New York and foreign ports; and that so much of the act in question was constitutional. The opin-

¹ In February, 1824, entitled "An Act concerning passengers in vessels arriving in the port of New York."

(a) See *Fitchburg v. Cheshire R.* 110 Mass. 210. A State legislature provided that each railroad company should annually fix its rates for the transportation of passengers and freight, and should be subject to a penalty if it charged a higher rate. A subsequent act of Congress provided authorized railroads to carry passengers and freight from one State to another, and to receive compensation therefor. *Held*, that the act of the State legislature was merely a police regulation, and was constitutional. *Railroad Co. v. Fuller*, 17 Wall. 560. See *Railroad Co. v. Richmond*, 19 Wall. 594.

ion of the court was delivered by Mr. Justice Barbour, who considered the act of the legislature of New York, not a regulation of commerce, but of internal police; and hence it was passed in the exercise of a power which rightfully and constitutionally belonged to the State. The intention of the law was viewed as intending to prevent the State being burdened with an influx of foreigners, and to prevent their becoming paupers, and who, as such, would become chargeable. It was not only the right, but the bounden duty of a State, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by an act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, are not surrendered or restrained by the Constitution of the United States. From this opinion, however, Mr. Justice Story dissented, and in support of his argument to the contrary, he relied on the opinion of Mr. Chief Justice Marshall, in *Gibbons v. Ogden*,¹ within the principles established by which case, he contended, the case before the court directly fell.²

§ 632. Again, at a late term of the Supreme Court of the United States,³ Mr. Justice McLean gave the opinion of the majority of the court, in *Smith v. Turner*, in error from the Supreme Court of New York, against the constitutionality of the statute of that State imposing a tax upon alien passengers, on the ground that it was a law regulating commerce. The case was distinguished from the above case of the *City of New York v. Miln*, inasmuch as the latter was determined upon the ground that the law there in question operated within the State of New York, and that it imposed no obstruction to commerce, nor caused any delay. A similar statute of the State of Massachusetts was at the same time held to be unconstitutional and void.⁴ (a)

¹ *Gibbons v. Ogden*, 9 Wheat. 1.

² *New York v. Miln*, 11 Pet. 102. There was no collision, it was held by the court, between the section of the act of New York, on which this suit

was brought, and the provisions of the laws of the United States of 1799, or 1819, relating to passengers.

³ At the December term, 1848.

⁴ *Passenger Cases*, 7 How. 283.

(a) In *Henderson v. Mayor of New York*, 92 U. S. 259, a statute of the State of New York, providing that, within twenty-four hours after the landing of any passenger from a vessel, the master should make a report to the mayor of New York, who should thereupon require a bond, for every passenger landed, in the sum of \$300, conditioned that the person should not require relief from

§ 633. Secondly, as to collision, and of the common and maritime law respecting it. The misfortune of a collision of one vessel with another may be the result of inevitable accident, or of circumstances beyond the control of the master, however mindful he may be of his responsibility, as by the violence of the wind and sea. It may be accidental, therefore, without fault on either side, or it may proceed from the negligence or unskilfulness of one or both the captains whose vessels come into collision.¹ Where an injury occasioned by a collision happens to one or both vessels, and is in consequence of mutual default, the apportionment of damages is different in the admiralty from what it is at common law. Neither party, we have seen, can sue at common law, where damage is occasioned partly by the default of one party, and partly by that of the other; and if, in the opinion of the jury, the default of one party in any way concurred in causing the damage in question, he is not entitled to recover.² (a) The rule of justice adopted by the admiralty in such cases, is, that the loss shall be apportioned between the parties according to circumstances.

§ 634. A court of common law, whether for its inability to adapt its judgment to cases of damage occasioned by collision of vessels from mutual negligence, or for any other cause, refuses to interfere at all.³ In an action in the King's Bench,⁴ a rule was obtained for setting aside an award of an arbitration, in a case for negligently running down the plaintiff's ship by another ship belonging to the defendants, on the ground of a mistake of the arbitrator in point of law. The alleged mistake was in awarding

¹ See Abbott on Shipp. (5th Am. ed.) 300 *et seq.* For the law in relation to the collision of vessels of common carriers of goods and merchandise by sea, see *ante*, §§ 166 and 226, and *Plaisted v. Boston Steam Nav. Co.* 27 Me, 132.

² *Ante*, § 556 *et seq.* *Ralston v. The States Rights*, Crabbe, 22.

³ Per Gibson, J., in *Simpson v. Hand*, 6 Whart. 311.

⁴ *Kent v. Elstob*, 3 East, 18.

the public authorities within four years, and that the giving of the bond might be commuted by paying \$1.50 for each person, was *held* to be unconstitutional. And in *Chy Lung v. Freeman*, 92 U. S. 275, a similar statute of California, applicable only to certain enumerated classes, among them "lewd and debauched women," was *held* unconstitutional.

(a) *Dowell v. Gen. Steam Nav. Co.* 5 Ell. & B. 195; 32 Eng. L. & Eq. 158. *Gen. Steam Nav. Co. v. Mann*, 14 C. B. 127; 26 Eng. L. & Eq. 341.

any damage to the plaintiff, when it appeared by his own showing, that either no negligence was imputable to the defendants, which was the gist of the action, or that at least the accident happened as much from the fault of one as the other. For these reasons, it was held, the award could not be supported, Grose, J., saying, that "it is evident that he (the arbitrator) meant to determine according to law, and he was mistaken in it; therefore, the award is not such as he intended it to be."

§ 635. Lord Tenterden, in two cases at *nisi prius*, has laid down the doctrine of the common law applicable to cases of damage by a collision of vessels, where the damage has been in consequence of mutual negligence. In *Vanderplank v. Miller*,¹ which was a "running-down" case, that learned judge, in summing up to the jury, said: "If there was want of care on both sides, the plaintiffs cannot maintain their action; to enable them to do so, the accident must be attributable entirely to the fault of the crew of the defendants." On another occasion at *nisi prius*, in an action for the negligence of the defendant's servant in managing his barge, whereby the plaintiff's barge was run down and sunk, Lord Tenterden said: "The plaintiff, in this case, complains of an injury to his barge through the negligence of the defendant's servants. If the accident happened from the state of the tide, or from any other circumstance which persons of competent skill could not guard against, the plaintiff is not entitled to recover; and so if the plaintiff's men had put this barge in such a place that persons using ordinary care would run against it, the defendant will not be liable. Nor will he be liable if the accident could have been avoided, but for the negligence of the plaintiff's men, in not being on board his barge at the time when it was lying in a dangerous place. The only case in which the defendant is answerable is, if the accident arose from the negligence or want of skill in his own men."² In an action in the Exchequer, for running down a vessel, Bayley, B., said: "The rule is, that the plaintiff could not recover if his ship were in any degree in fault, in not endeavoring to prevent the collision. Here the plaintiff had a right to presume that the defendant's ship would do that which she ought to do. I quite agree, that

¹ *Vanderplank v. Miller*, 1 Moody & M. 21.

² *Lack v. Seward*, 4 Car. & P. 106.

if the mischief be the result of the combined negligence of the two, they must both remain in *statu quo*, and neither party can recover against the other.”¹

§ 636. In this country the above doctrine has been recognized by the courts in a number of instances, as applicable in navigation to vessels, as well as to carriages on land.² In Pennsylvania,³ it was held to be an undoubted rule, that for a loss arising from mutual negligence, neither party can recover in a court of common law; and this rule governed the shippers of goods on board vessels which come into collision, to the injury of the goods, as well as the owners of the vessels. Therefore it was held, that an action could not be maintained by the owner of goods on board a vessel against the owners of another vessel, to recover damages for an injury done to the goods by a collision of the two vessels, if there has been mutual negligence in the conduct of those who had the vessel in charge.⁴ (a) In Maine,⁵ the court, after a

¹ *Vennal v. Garner*, 1 Crompt. & M. 21. *Steamboat Farmer v. McCraw*, 26 Ala. 189.

² See *ante*, § 557 *et seq.*; and see note to *Smith v. Smith*, 2 Pick. 624 (ed. 1848). In the case of *Palmer v. Barker*, 2 Fairf. 338, the opinion states that when two persons are travelling in opposite directions, and are about to meet and pass each other, in so doing both are bound to use ordinary care and caution. And see *Hartfield v. Roper*, 21 Wend. 615.

³ *Simpson v. Hand*, 6 Whart. 311.

⁴ By the common law, the liability to contribution, of cargo on board the wrong-doing vessel, could only lead to circuity of action, inasmuch as the freighter might recover the amount paid by him from the owners of the

vessel. But an action may be maintained by the owner of goods lost or damaged by collision against the owners of the vessel which can be proved to have been in fault. *Abbott on Shipp.* (5th Am. ed.) 313. As between the owners and the freighter, in cases of accident, the injury caused by a collision is a “peril of the sea,” within the usual exception of the charter-party. *Abbott on Shipp.* (5th Am. ed.) 313. *Buller v. Fisher*, 1 Esp. 67. And, in one case, a loss resulting from collision occasioned by gross negligence was also held to have occurred by “perils of the sea.” *Smith v. Scott*, 4 Taunt. 125. See *ante*, § 166.

⁵ *Kennard v. Burton*, 12 Me. 39.

(a) *Duggins v. Watson*, 15 Ark. 118. *Otis v. Thom*, 23 Ala. 469. And the same principle applies where a person on board a boat or other means of conveyance is injured by means of the negligence of those in another vehicle. *The Maverick*, 1 Sprague, 23. *Cattlin v. Hills*, 8 C. B. 123. *Thorogood v. Bryan*, 8 C. B. 115. *Rigby v. Hewitt*, 5 Exch. 240. *Armstrong v. Lancashire R. L. R.* 10 Ex. 47. *Brown v. New York R.* 31 Barb. 385. But see *contra*, *Chapman v. New Haven R.* 19 N. Y. 341; *Colegrove v. Harlem R.* 6 Duer,

careful examination of the adjudged cases respecting collisions, held the correct rule to be as above laid down.

§ 637. The doctrine of the common law, that neither party can recover for damage which has resulted from mutual negligence, has in this country been applied to canal-boats. The "Canal Regulations" in New York have adopted, for the regulation of canal navigation, what is essentially the American law of the road;¹ that is, when boats meet on the canals, it is the duty of the master of each to turn out to the right hand, so as to be wholly on the right side of the centre of the canal.² If, at the time of a collision of two boats, either of them, through negligence or design, is near the centre of the canal, neither having turned sufficiently to the right, whatever injury results is the common fault of both parties, and the owners of each boat must submit to the injury done to them, in consequence of the mutual default. Every boat, navigating the New York canals, is also required to carry conspicuous lights on its bow; and a want of lights on the bow is negligence.³

¹ When two persons are travelling with carriages on the road, and are about to meet and pass each other, each is bound to pass to the right of the centre of the travelled road, and in so doing to use ordinary care and caution; and if one of them, by omitting this care and caution, be injured in his person or property, he is without legal remedy. See *ante*, § 549 *et seq.*; *Palmer v. Barker*, 2 Fairf. 338.

² 1 New York Rev. Stat. 248, § 154.

1 New York Rev. Stat. 695, § 1.

³ *Rathbun v. Payne*, 19 Wend. 399.

But there may be a third boat con-

cerned, and there is a duty towards her to be attended to. Under the 7th section of the act of Pennsylvania of April 10, 1826, where an ascending and descending boat have to pass each other, near to, or at a narrow place in a canal, constructed under the laws of the State for inland navigation, it is the duty, as between themselves, of the ascending boat to wait at such distance from such narrow place as to permit the descending boat to pass with safety; and if any injury be sustained by the descending boat, through a non-compliance with the law on the part of the ascending boat, the latter

382, 20 N. Y. 492; *Brown v. New York R.* 32 N. Y. 597; *Webster v. Hudson River R.* 38 N. Y. 260; *Eaton v. Boston & Lowell R.* 11 Allen, 500. See *Lockhart v. Lichtenthaler*, 46 Penn. State, 151. In *Child v. Hearn*, L. R. 9 Ex. 176, the plaintiff, who was in the employ of a railroad corporation, was returning from his work on a car propelled by hand. Some pigs got through an insufficient fence, and coming upon the track the car was upset. *Held*, in an action against the owner of the land, that the plaintiff was identified with the railroad, and that as it was bound to maintain a sufficient fence the plaintiff could not recover.

§ 638. But it is to be observed, that, in cases of mutual negligence, the plaintiff will be entitled to recover if the want of ordinary care on his part did not contribute to produce the injury. In the language of Coleridge, J., to the jury: "If the plaintiff's servants substantially contributed to the injury, by their improper or negligent conduct, the defendants would be entitled to their verdict; but if the injury was occasioned by the improper or negligent conduct of the defendant's servants, and the plaintiff's servants did not substantially contribute to produce it, then the plaintiff would be entitled to a verdict."¹ This was the case of a brig carrying her anchor in a position contrary to the by-laws of the river Thames, at the time when she came into collision with a barge; and it was held, that the improper carrying of the anchor would not, of itself, be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although, but for the position of the anchor, the collision would not have produced the injury complained of. Coleridge, J., told the jury, if they thought the mischief was occasioned by any want of skill, or by any negligence or improper conduct whatever, on the part of the men on board the brig, without the men on board the barge having substantially contributed to produce it, then the plaintiff would be entitled to their verdict. On the other hand, if they thought that the men on board the barge substantially contributed to the mischief, to its happening, to its taking place, then the defendant would be entitled to a verdict.² Where the claim of the defend-

is liable for such injury. But where a boat of a third party, moored properly to the bank of a canal for a lawful purpose, is concerned, and the ascending boat will not comply with the directions of the act of the State, it is held to be the duty of the persons having the charge of the descending boat to keep her at a proper distance and under their control, so as to insure safety; and if, through culpable negligence, or a want of due caution in passing each other, a collision takes place, through and by which the descending boat is driven against, and staves in, such third boat, the owners

or persons in charge of the descending boat are answerable in damages for the injury sustained by such third boat. *Sherrer v. Kissinger*, 1 Barr, 44.

¹ *Sills v. Brown*, 9 Car. & P. 601.

² One of the jury asked, whether they were not told, that the way in which the anchor was placed had nothing to do with the question. Coleridge, J.: "No. You must have misunderstood my observations, if that was the impression you received. The position of the anchor will not be sufficient to make the defendant liable, if the plaintiff, by his servants,

ant, in an action for an injury to the plaintiff's steamboat was, that the injury was occasioned by the neglect of the officers and crew of such boat to keep up lights according to the statute; and the court charged the jury, that if such officers and crew were guilty of negligence, either in respect to the lights or otherwise, to such a degree as essentially to contribute to the injury complained of, the plaintiff could not recover; it was held that the charge was unexceptionable; and the court, in giving their opinion, expressly sanction the rule as above laid down by Coleridge, J.¹ In short, the result of the cases clearly is, that, although there has been negligence on both sides, the plaintiff may be entitled to recover, inasmuch as the fault of the plaintiff, in order to prevent his recovering, must be one directly tending to produce the injury.²

§ 639. In an action against the owner of a brig, for an injury done to a sloop belonging to the plaintiff, the amount of damage proved was upwards of £500, and the jury gave a verdict for £250 only; and on being asked how they made up their verdict, they replied, that, in their opinion, there were faults on both sides. It was held that, notwithstanding this, the plaintiff was entitled to a verdict, as there might be faults in the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering.³ The verdict in this case, as well as the opinion given by Chief Justice Tindal, is sustainable in point of law, according to a case decided in the Exchequer,⁴ which was an action on the case for the negligent management of a train of railway cars; and Mr. Baron Parke said: "There may have been negligence in both parties, and yet the plaintiff may be entitled to recover."

§ 640. Indeed, in cases of injury done by one vessel to another by collision, or other means, the authorities warrant the position, that the jury may take an equitable view of the facts and circum-

substantially contributed to the occurrence of the injury, not to its amount, but to the occurrence of it." The verdict was for the defendant.

¹ *New Haven Steamboat Company v. Vanderbilt*, 16 Conn. 420.

² *Kennard v. Burton*, *ub. sup.*
Rathbun v. Payne, 19 Wend. 399.
Marriott v. Stanley, 1 Scott, N. R.

392. *Raisin v. Mitchell*, 9 Car. & P. 613, n. *Collinson v. Larkins*, 3 Taunt. 1. *Luxford v. Large*, 5 Car. & P. 421.

³ *Raisin v. Mitchell*, 9 Car. & P. 613.

⁴ *Bridge v. Grand Junction R.* 3 M. & W. 244.

stances, as was expressly held by Tindal, C. J.¹ That case was an action to recover damages for the upsetting of a barge laden with coal, and it appeared that a small steam-vessel belonging to the defendants, and called the "Water Lily," was proceeding down the river, preceded by a larger one, called the "Ramona," and that, in consequence of the swell, occasioned by one or both these vessels, the plaintiff's barge was swamped and the coals lost. The amount of damage was about £80; but the jury returned a verdict for only £20, assigning as a reason for giving only that sum, that they did not think the "Water Lily" to have been the sole cause of the accident. Erskine, J., said: "The jury might well conclude, that the 'Water Lily' had at least contributed to the accident, and, if so, though the swell occasioned by the defendant's vessel would not, in all probability, have caused the barge to sink, if the water had not been previously agitated by the passing of the 'Ramona,' still the owners of the 'Water Lily' were in strictness liable for the whole damage. The jury, however, taking an equitable view of the facts, evidently thought it not fair to make the defendants pay for an injury which was only in part attributable to them." The court refused to interfere with the verdict.²

§ 640 *a*. The weakness of the vessel injured by collision is no protection to the owners of the other vessel, if they have been guilty of negligence; and the circumstances may be such as to require even more than ordinary care on their part. In an action on the case founded on the allegation that the plaintiffs being possessed of a boat tied to a wharf, and the defendant being possessed of another boat, did, by himself and servants, manage his boat so carelessly, that it ran against the plaintiffs' boat, whereby she was sunk, &c. The collision occurred in removing the defendant's boat from a position above to one below that of the plaintiffs' boat, in doing which the defendant's boat necessarily passed outside of the plaintiffs'. There being evidence conducing to prove that the plaintiffs' boat was not so strong as boats ordinarily were, in which very heavy articles were transported in the river, the principal question was as to the effect which this fact should be

¹ *Smith v. Dobson*, 3 Scott, N. R. 336; 3 Man. & G. 59.

² And per Coltman, J.: "The foreman is to give in the verdict, but

he has no power to qualify that verdict by any observation he may think fit to add."

entitled to in determining the liability of the defendant, or the degree of diligence to which he was bound in removing his boat. It was held, that the weakness of the boat injured by collision afforded no protection against the defendant's want of proper care; but that as the weakness rendered the boat more liable to injury from collision, it demanded greater vigilance and precaution on the part of those who knew the fact.¹

§ 641. The above cases illustrate the common law in respect to damage resulting from a collision of one vessel with another, when it has resulted from the negligence or mismanagement of the master or crew of both vessels. In the admiralty, before which court misfortunes of this kind have been frequently the subject of controversy, the loss, as has before been stated, must be apportioned between the parties, as having been occasioned by the fault of both of them.²(a) There has been much difference in the codes and authorities in maritime law, whether the cargo as well as the vessel was to contribute to the loss.³ But in a case before the House of Lords in England,⁴ the cargo of the ship that was sunk and lost by the collision received the benefit of the contribution; the House determining, after the address to them by Lord Gifford, that both vessels were in fault.⁵ Lord Denman,

¹ *Inman v. Funk*, 7 B. Mon. 538.

² *Abbott on Shipp.* (5th Am. ed.) 303. We have before seen, that by an act of Congress the jurisdiction of the District Courts of the United States has been extended to certain cases upon the lakes (see *ante*, § 610 a). For a precedent of a libel in a case of collision under this act, see Appendix.

³ *Abbott on Shipp.* 300-314. 3 Kent, Com. 231. *Story on Bailm.* §§ 607-611.

⁴ *Hay v. Le Neve*, 2 Shaw, Scotch App. Cas. 395.

⁵ The decree stated, that "the Lords find that the appellants are liable to the respondents, in the sum of

£1,535 16s., one half the value of the 'Wells' and cargo, such half not exceeding the value of the 'Sprightly' and her freight." The court of admiralty, says *Story* (*Story on Bailm.* § 607, n. 3), continues to act upon this rule, "as the sound doctrine of the maritime law;" and he refers to *De Vaux v. Salvador*, 4 A. & E. 420; and he says the rule of the admiralty was fully recognized by Judge Hopkinson, in *Reeves v. The Ship Constitution*, Gilpin, 579. He also refers to 2 *English Monthly Law Magazine*, 607; 4 *Ib.* 88; 5 *Ib.* 45; 8 *Ib.* 446; 5 *Ib.* 303.

(a) *Vaux v. Sheffer*, 8 Moore, P. C. 75. *Hay v. Le Neve*, 2 Shaw, Scotch App. Cas. 395. *The Victoria*, 3 W. Rob. 49. *The Montreal*, 24 Eng. L. & Eq. 580. *The Monarch*, 1 W. Rob. 21. *Schooner Catherine v. Dickinson*, 17 How. 170. *Rogers v. Steamer St. Charles*, 19 How. 108. *Cushing v. The John Fraser*, 21 How. 184.

adverting to the occasional hardship of the principle, says: "It grows out of an arbitrary provision in the law of nations, from views of general expediency, not as dictated by natural justice, nor possibly not quite consistent with it."¹ Kent, in his Commentaries, speaks after Cleirac,² of the rule as *rusticum judicium*.³ But collision, in the open sea, is comparatively rare, and generally accidental, while in roads and in confined navigations it is a disaster of frequent, and seldom of blameless occurrence; and "there is no better means," says Valin (adopting the reasoning of The Jugemens d'Oleron), "of making the masters of small vessels, which are liable to be injured by the slightest shock, attentive to avoid collision, than to keep the fear of paying for half the damage constantly before their eyes."⁴

§ 642. Lord Stowell, in the case of the "Woodrop Sims,"⁵ states four possibilities under which collision may occur. "In the first place, it may happen without blame being imputed to either party, as where the loss is occasioned by a storm or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree.⁶ (a) Secondly, a misfortune of this kind may arise, where both parties are to blame, or where there has been want of due diligence, or of skill on both sides: in such case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burden. Fourthly, it may have been the fault of the ship which ran the other down, and in this case the innocent party would be entitled to an entire compensation from the other." If the master or owner of

¹ De Vaux v. Salvador, 4 A. & E. 420.

² Cleirac, Us et Coutumes de la Mer, 68.

³ 3 Kent, Com. 231.

⁴ Abbott on Shipp. (5th Am. ed.) 306.

⁵ The Woodrop Sims, 2 Dods. 83.

⁶ See Story on Bailm. § 608; Reeves

v. The Ship Constitution, Gilpin, 579; Steamboat Co. v. Whilldin, 4 Harring.

Del. 228; Cummins v. Spruance, 4 Harring. Del. 315. In cases of col-

lision of vessels occasioned by stress of weather, and neither party is in fault, the owner of the injured vessel must bear the loss. Brig Veruma v.

Clark, 1 Texas, 30.

(a) Stainback v. Rae, 14 How. 532. Union Steamship Co. v. New York Steamship Co. 24 How. 307. The Morning Light, 2 Wall. 550. The Java, 14 Wall. 189. The Virgil, 2 W. Rob. 205.

one of the colliding vessels is unwilling to bear his own loss, and desires to fix it upon the other, he may seek his remedy in the court of admiralty, commencing with the arrest of the vessel, or in a court of common law; and, if he can prove that the master of the defendant's vessel was alone in fault, or that no want of ordinary care or skill, on his own part, contributed to the misfortune, he will be entitled, in either tribunal, to recover a full compensation.¹

§ 643. It is very obvious that, in all cases of collision, the essential inquiry is, whether measures of precaution are taken by the vessel which has run down the other; and it is obvious, also, that the question is one partly of nautical care and skill, and partly a question of nautical usage.² Where the evidence on both sides is conflicting and nicely balanced, a court of admiralty will be guided by the probabilities of the respective cases which are set up. *A priori*, the presumption is, that the master of a vessel would do what was right, and follow the regular and correct course of navigation. In the case of the "Mary Stewart,"³ which was a case of collision, the testimony of the witnesses on the one side and the other was so conflicting that the court requested the opinion of Trinity Masters upon the probabilities of the respec-

¹ Abbott, &c., *supra*. "In cases of collision," says Story, "where a loss is caused by the fault of one of the ships only, the general maritime law exacts a full compensation, to be paid out of all the property of the owners of the guilty ship, upon the common principle applied to persons who undertake the conveyance of goods, that they are answerable for the conduct of the agents whom they employ; and the other parties who suffer the damage place no trust in these agents, and can exercise no sort of control over their acts. To this rule England for a long time conformed. But Holland, having for the protection of its own navigation limited the remedy against the owner to the value of the ship, freight, apparel,

and furniture, England has recently followed the example, and established by statute a like limitation. (See *ante*, § 90.) In America, no positive enactment has been made; and therefore the responsibility of the guilty ship and its owners stands upon the general maritime law." (a) Story on Bailm. § 608 *d*. But see *ante*, § 90.

² Story on Bailm. § 611. The Friends, 1 W. Rob. 478. General Steam Navigation Co. v. Tonkin, 4 Moore, P. C. 314. Steamboat Co. v. Whilldin, 4 Harring. Del. 228. Lowry v. Steamboat Portland, *post*, §§ 655, 662. Williamson v. Barrett, 13 How. 101.

³ The Mary Stewart, 2 W. Rob. 244.

(a) This matter is now regulated by statute in this country. See *ante*, § 90.

tive statements in issue. If a vessel be at anchor, with no sails set, and in a proper place for anchoring, and another vessel, under sail, occasions damage to her, the latter is liable. (a) On the other hand, if the place of anchorage is an improper place, the owners of the vessel which is thus injured must abide the consequences of the misconduct of the master. (b) A vessel ought not to be moored and lie in the channel or entrance to a port, except in cases of necessity; and if so anchored from necessity, she ought not to remain there any longer than the necessity continues, and by so doing, and a collision occurs, with a vessel entering the harbor, she will be considered in fault.¹ In a suit in the admiralty, it was given in evidence for the libellants, that the ship "Harriet," after sailing from New Orleans, passed over the bar through one of the passes or outlets of the Mississippi River, and came to anchor near the bar. Another ship, the "Louisville," lying below, a distance of several miles, weighed anchor with a fresh and favorable wind for coming in through the same pass. As the "Louisville" approached the bar, the wind died away, and the current being stronger than usual, owing to a strong wind from the south the night before, she drifted and so ran afoul of the "Harriet." These passes, it appeared, are intricate and difficult to navigate, and subject to counter and under currents; and if the wind dies away when a ship is coming in, she is certain to drift and become unmanageable. The question, under these facts, was, whether a prudent master would anchor his vessel so immediately in the thoroughfare as did the "Harriet;" and that, too, after having been run afoul of by another vessel a year before, at or near the same place. The District Court decreed in favor of the libellants, and against the "Louisville," her tackle, &c. The decree was, however, reversed in the Circuit Court with costs, in which the opinion of Mr. Justice McKinley was, that the third rule above mentioned

¹ The Scioto, Daveis, 359.

(a) The Lochlibo, 3 W. Rob. 310; 1 Eng. L. & Eq. 651. Netherlands Steamboat Co. v. Styles, 9 Moore, P. C. 286. The Bothnia, 2 Law T. (N. S.) 160. Culbertson v. Shaw, 18 How. 584. Steamboat New York v. Rea, 18 How. 223.

(b) In the case of The Schooner Marcia Tribou, 2 Sprague, 17, a schooner going out of Boston Harbor ran into a sloop. Both vessels were held in fault, the schooner for not keeping a proper lookout forward, and the sloop for being anchored in the channel.

of Lord Stowell, viz., that the sufferer must bear his own burden under this third possibility under which a collision may occur, applied with great force to the case under consideration. It was admitted by the learned judge, that the opinions of some nautical men, found in the evidence, showed that it was possible for the "Louisville" to have avoided the collision, had every thing been done that it was possible to do. But, said he, "the law imposes no such diligence on the party in this case; so far as the 'Harriet' was concerned, the 'Louisville' was entitled to the full use of the thoroughfare of the pass; the master of the 'Harriet' having obstructed it, with a full knowledge of the danger of doing so, has been guilty of such misconduct as to deprive the appellees of the right of action against the appellants."¹ On appeal by the libellants to the Supreme Court, that court being equally divided in opinion, the judgment of the Circuit Court was affirmed. If in this case the anchor had been too light to hold the ship, and she consequently had dragged it, and she thereby had run against the other vessel, the responsibility of the loss would have fallen upon the owners of the anchored ship, inasmuch as she would have been negligently and improperly anchored.²

§ 644. The anchorage of a vessel should always be properly taken up, and the anchor sufficiently large, and if not so, and a collision is the consequence, the blame must be imputed to the master; whereas, if the collision arose merely from the violence of a squall, it will then be the result of inevitable accident. A commander of a ship was condemned in the admiralty in a cause of damage, the collision having been occasioned by his anchoring too near the damaged vessel, and having anchored with only one anchor, the weather being squally and tempestuous.³ The owners of a vessel disabled by the negligence of its crew are clearly answerable for damage done by accidentally drifting, when so disabled, against another vessel.⁴

§ 644 *a*. There is no doubt that a vessel in motion is bound

¹ *Strout v. Foster*, 1 How. 89.

² *The Massachusetts*, 1 W. Rob. 71.

³ *The Volcano*, 2 W. Rob. 337.

⁴ *Seecombe v. Wood*, 2 Moody & R. 290. *Walker v. U. S. Ins. Co.* 11 S. & R. 61. If in a river there be a common and known passage-way for

vessels to a wharf, there is ordinarily no right in any person to obstruct it by anchoring a vessel upon it, or so near to it as to expose another vessel to danger, by compelling her to depart from the passage-way. *Knowlton v. Sandford*, 32 Me. 148.

to steer clear of a vessel at her moorings, and that nothing can excuse her from making compensation but unavoidable accident, the *vis major* which no care can guard against;¹ for it is the duty of every vessel, seeing another at anchor, whether in a proper or an improper place, and whether properly or improperly anchored, to avoid, if practicable and consistent with her own safety, any collision.² It may perhaps be stated, as an established general rule, that a vessel entering a harbor in the night time is put on her utmost vigilance; (a) and this is more especially so, if the port is one much resorted to in bad weather, as a harbor of refuge, and when it is reasonable to expect that the harbor will be crowded with water-craft. The master and crew should be on deck, and in such parts of the vessel as to be able to control her motions, and to see any vessel that lies, in her track, and which they may be approaching. And always, when a collision takes place between a vessel under sail and one at anchor, the *prima facie* presumption, if there be any fault, is, that it is on the part of the vessel which is under sail.³

§ 645. If a vessel chooses to avail herself of a particular mode of going down a river at a particular time, which renders it difficult to escape a collision, she must bear the consequences of a contingency to which she has exposed herself. Thus a plea in the admiralty, in a cause of damage, that the ship causing the collision was being warped down the river at the time, and in consequence could not get out of the way, was overruled.⁴ (b)

§ 646. The laws of Oleron and of Wisbuy made it the duty of a master of a vessel always, when in port, to keep a buoy to his anchor, and rendered him liable for all damage caused by a neglect to do it.⁵ It has been held at common law, that, if a vessel is sunk by inevitable accident, in a public navigable river, and without, therefore, any fault on the part of the owner, a buoy

¹ The *Girolamo*, 3 Hagg. 173.

² The *Batavier*, 10 Jur. 19.

³ The rule is so stated by Boulay Paty, *Droit Maritime*, tit. 12, § 6, vol. 4, p. 492, and recognized in The

Scioto, Daveis, 359. The *Neptune*, 1 Dods. 467.

⁴ The *Hope*, 2 W. Rob. 8.

⁵ Laws of Oleron, Art. 14. Laws of Wisbuy, Art. 28. And see 1 Pet. Adm. Appx. 28, 78, 85.

(a) *Culbertson v. Shaw*, 18 How. 587. *Ward v. The Schooner Dousman*, 6 McLean, 231.

(b) See *Potter v. Pettis*, 2 R. I. 483.

must be placed over it for the common safety ; and this was held by Lord Ellenborough to be the only proper and specific notice, and the one which all persons understand and are bound to attend to. Although the party, in such case of inevitable accident, is not liable to indictment for not removing the wreck, yet he is liable for damages in a civil action occasioned by a neglect of such notice ; a verbal communication by a person stationed near the spot of the sunken vessel is an admonition liable to be misunderstood, and is not a sufficient warning.¹ But it has been considered remarkable that Lord Ellenborough should have assumed such to be the law.² And in the English Court of Common Pleas, in 1848,³ it was expressly held, that, where a vessel is sunk by inevitable accident, or without any fault on the part of the owner or his servants, in a navigable river, and remains there under water, no duty is cast upon the owner to use any precaution, in the absence of any positive enactment to that effect, by placing a buoy or otherwise ; and that the owner therefore is not liable, either to an indictment, or to an action at the suit of a party sustaining special damage in respect of such omission. Such an obstruction is, indeed, incident to commerce, and when not the result of negligence, is not unlawful, and imposes no duty ; for the vessel without his fault has been put beyond the control of the owner, and he has been an innocent sufferer.⁴ (a) Ships of the larger class and tonnage, when deeply laden, have often grounded in ascending and descending the river Delaware ; but it has never been considered an illegal obstruction of the channel, or a public nuisance, if ordinary care has been exercised.⁵

§ 647. In many ports there are Trinity House regulations, requiring vessels at anchor in a navigable river, or port of much commerce, to have a light hung out conspicuously on dark nights ;⁶ (b) and the boats navigating the New York canals, we

¹ Harmond v. Pearson, 1 Camp. 515.

² Per Maule, J., in Brown v. Mallett, 5 C. B. 599.

³ Ibid.

⁴ Rex v. Watts, 2 Esp. 675.

⁵ Cummins v. Spruance, 4 Harring. Del. 315.

⁶ 3 Kent, Com. 230, n. (c). Though it has never been laid down as a general principle, by the English court of admiralty, that merchant vessels

(a) See White v. Crisp, 10 Exch. 312 ; 26 Eng. L. & Eq. 532.

(b) The matter of lights is now regulated in the United States by the Rev. Sts. §§ 4233, 4234, re-enacting the St. of 1864, c. 69, 13 U. S. Sts. at Large,

have seen, are subject to a like regulation, in order to avoid injury in their passing each other.¹ By the act of Congress, also, providing for the better security of the lives of passengers on board of vessels propelled by steam, it is made the duty of the master and owner of every steamboat, running between sunset and sunrise, to carry one or more signal lights;² and by the English statute, 9 & 10 Vict. c. 100, § 9, every steamer in any river, or narrow channel in Great Britain or Ireland, or in the sea within twenty miles of the coast, is required to exhibit signal lights between sunset and sunrise.³ In the case of the "Aliwal,"⁴ it was stated that, "by an act of Parliament which directs that all sailing vessels, when under sail, or being towed, approaching or being approached by any other vessel, shall be bound to show, between sunset and sunrise, a bright light, in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision."

ought constantly to carry lights. The Rose, 2 W. Rob. 4; Columbine, 2 W. Rob. 33.

¹ *Ante*, § 637.

² Act of Congress of 1838, c. 191, § 10. See the act in the Appendix.

³ The section referred to reads as follows: The master or other person having charge of any steam-vessel in any river or narrow channel in Great Britain or Ireland, or the adjacent islands, or in the sea within twenty miles of the coast, shall, whether under weigh or at anchor, between sunset and sunrise, exhibit such lights in such manner, and under such circumstances, as, by the regulations therein authorized to be made by the Lords Commissioners of the Admiralty, shall be required, under a penalty of not exceeding £20 for each night's default. And the owner of any steam-vessel in which such light shall not be so ex-

hibited shall not be entitled to recover any recompense or damage whatever which may be sustained by such vessel in consequence of any other vessel running foul thereof during the night. By section 13, if any damage to any person or property shall be sustained in consequence of the non-observance, as respects any steam-vessel, of the rules in this act contained, relative to steam-vessels passing each other and exhibiting lights at night, the same shall in all courts of justice be deemed, in the absence of proof to the contrary, to have been occasioned by the wilful default of the master or other person having the charge of such steam-vessel, and such master or other person shall be subject, in all proceedings, whether civil or criminal, to the legal consequences of such wilful default.

⁴ The Aliwal, 25 Eng. L. & Eq. 602.

58. Under U. S. St. 1849, c. 105, it has been *held* that the want of a light will not prevent the vessel so in fault from recovering half damages if the other vessel is also in fault. *Chamberlain v. Ward*, 21 How. 548. See also, under the St. of 1864, *The Ariadne*, 12 Wall. 475; *The Gray Eagle*, 9 Wall. 505.

§ 648. The very fact that there have been as many instances of imposing by statute upon masters of vessels the obligation of carrying, on dark nights, lights conspicuously hung out, and prescribing a penalty for disobedience, argues culpable negligence in the omission of it, if there were no positive regulation upon the subject. In reference to the act of Congress mentioned in the preceding section, Wayne, J., has said, that, besides the penalty it prescribes, "if neglect or disobedience of it shall be proved to exist when injury shall occur to persons or property, it will be thrown upon the master and owner of a steamboat, by whom the law has been disregarded, the burden of proof, to show that the injury was not the consequence of it."¹ It was said by the court² that there was no general and absolute usage on this subject, and that the omission of a light might or might not be a fatal negligence, according to the circumstances. That was an action on the case, by the owners of a fishing smack against the owners of a vessel, to recover damages alleged to have been occasioned by the negligence and unskilfulness of those who had charge of the defendants' vessel, in running against the plaintiffs' vessel whilst lying at anchor in Provincetown Harbor. There was no light burning on the deck of the plaintiffs' vessel, but it was, although cloudy and misty, light enough for a seaman to discern a vessel at anchor at a considerable distance. It was contended, for the defendants, that it was necessary for the plaintiffs to show that they had a light on their deck, and requested the judge so to instruct the jury. But he instructed them, that whether the plaintiffs ought to have a light on deck depended on the circumstances of the case, especially the position of the vessel at anchor, and the state of the light from the heavens; that if the vessel was in the usual place of anchorage, and there was light enough to enable the running vessel, with a good lookout, to see and avoid the vessel at anchor, it was not necessary for the plaintiffs to keep a light on deck; but if she was in an unusual or exposed place, and if it was so dark that a vessel at anchor could not be seen and avoided without a light on deck, it was carelessness not to have one; that what would be suitable and necessary precaution in one situation and state of circumstances, would be insufficient in another. To

¹ *Waring v. Clarke*, 5 How. 441.

² *Carsley v. White*, 21 Pick. 254.

this instruction the defendants excepted; and if the jury should have been instructed that it was necessary for the plaintiffs to have had a light on deck, the verdict, which was for the plaintiffs, was to be set aside, otherwise judgment was to be rendered on the verdict. Morton, J., who delivered the opinion of the court, had no doubt of the correctness of the instructions to the jury; and held, that it was incumbent on the plaintiffs to show that the injury of which they complained was caused by the misconduct of the defendants, and did not arise from their own negligence. "Whether," said the learned judge, "common care and prudence required of the plaintiffs to have a light, and the omission to have it amounted to negligence, must depend on the darkness of the night, the number and situation of the vessels in the harbor, and all the other circumstances connected with the transaction." This, said he, was a question of fact, within the province of the jury; and as it was submitted to them, with proper comments and instructions, and they had decided it, there was no reason to complain of their decision.

§ 649. It was said, in the case of the collision between the "Scioto" and the "Falcon," in the harbor of Portland (the "Falcon" lying at anchor there), one fault imputed to the "Falcon" was that of not showing a light. It appeared to the learned judge, before whom the cause was tried, if she had showed a light, to be nearly certain that she would have been seen from the "Scioto," in approaching her, in season to have avoided the collision. If she had had a light, said he, suspended in a conspicuous place, and a collision had taken place, it would, to say the least, have been extremely difficult for the colliding vessel to have excused herself; for, admitting the vessel was anchored in an improper place, her fault would not excuse any want of care and caution in another vessel.¹ That the hoisting of a light in a river or harbor at night, amid an active commerce, was a precaution imperiously demanded by prudence, and the omission of it is not to be considered otherwise than as negligence *per se*, was held by the Chief Justice of Pennsylvania, in *Simpson v. Hand*.² That was an action on the case to recover damages for injury

¹ By the learned Judge Ware, Kent, Com. 230, n. c (6th ed.); and Daveis, 368.

² *Simpson v. Hand*, 6 Whart. 311. Del. 228. That opinion approved by Kent, 3

done to goods on board of a vessel while she was lying at anchor in the river Delaware, by a vessel coming up the river in the night time ; and the court held, that if the anchored vessel was moored in the channel of the river without a visible light burning at the time, or if her watch was not on deck, and did not do what was customary for the purpose of avoiding a collision, there was such negligence as to bar the action ; though there might have been negligence on the other side. (*a*)

§ 650. Nothing is better settled in the admiralty than that, in dark and foggy nights, measures of strict precaution are expected on the part of a master of a vessel, in order to avoid chances of collision ; (*b*) and if, amid nocturnal darkness or fog, a vessel should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution that would have rendered the accident less probable. However important it may be that a voyage should be completed in the most speedy manner, such speed must be combined with safety to other vessels. This is the expressly declared doctrine of the courts of admiralty, and was applied to the case of the “*Virgil*,” which vessel, sailing upon a dark and foggy night, with her topmast studding-sails set, and coming into collision with the sloop “*Jean*,” was condemned in the damage sued for.¹ But in the case of the “*Ebenezer*,” it was held, that a

¹ The *Virgil*, 2 W. Rob. 201. In an action on the case for running down the plaintiff's brig, it was proved that the defendant's vessel was sailing in the channel before the wind, having her studding-sails set at night, and that the plaintiff's brig was sailing by the wind, and the jury found a verdict for the defendant. The court granted a new trial for the purpose of further investigating the facts, as there was some doubt as to the propriety of carrying studding-sails at such a time and in such a place, and

(*a*) If a vessel is fastened to a wharf, she is not, in the absence of a statute or a harbor regulation to that effect, bound to have a light set. The *Bridgeport*, 14 Wall. 116.

(*b*) By U. S. St. 1864, c. 69, art. 10, whenever there is a fog, by day or by night, the following fog-signals are required to be carried and used, and to be sounded at least every five minutes: viz., steamships under way must use a steam-whistle placed before the funnel, not less than eight feet from the deck; sailing-vessels under way must use a fog-horn ; steamships and sailing-vessels when not under way must use a bell. See U. S. Rev. Sts. § 4233.

vessel running free with a fair wind, and carrying her squaresail, topmast studding-sail, fore-and-aft mainsail and gaff topsail set, the weather being dark and thick, and the night foggy, the case was dismissed in the admiralty upon the ground of inevitable accident. This case shows how much depends upon the courses of two vessels, &c., and the court thought there were many difficulties in the case, which might have misled both parties. It was also stated, in behalf of the "Ebenezer," that the reason she carried so much sail as she did, was, that a very large number of vessels were immediately in her wake, and that she carried the sail in question for the purpose of avoiding the possibility of any of the vessels running into her.¹ In the case of the "Itinerant," the court said: "It is unquestionably the duty of every master of a ship, whether in an intense fog or great darkness, to exercise the utmost vigilance, and to put his vessel under command so as to secure the best chance of avoiding all accidents, even though such precautions may occasion some delay in the prosecution of the voyage. It may be, that for such a purpose it would be his duty to take in his studding-sails; but such is the constantly varying combination of circumstances, arising from locality, wind, tide, number of vessels in the track, and other considerations, that the court cannot venture to lay down any general rule which would absolutely apply in all cases."² (a)

§ 650 *a*. Steamers being more under control than sailing-vessels, their duty in regard to avoiding collision can be more definitely stated.³ A large steamer proceeding on a dark night in the Frith of Clyde, a very thronged thoroughfare, at the rate of from twelve to fourteen miles an hour, came in collision with a small schooner, which, being deeply laden, and proceeding against the tide with a very light wind, had very little way on her, and was therefore incapable of altering her position. The schooner showed no lights and was not discovered by the steamer until close upon her, when a collision ensued, in consequence of which the schooner almost immediately sunk. It was held, that, under the circum-

also as to whether the defendant's captain had kept a proper lookout. *Jameson v. Drinkald*, 12 Moore, 148.

¹ *The Ebenezer*, 2 W. Rob. 206.

² *The Itinerant*, 2 W. Rob. 236.

³ See *post*, §§ 656, 657, 663. A steamboat can be stopped in nearly her whole length. *The Perth*, 3 Hagg. Adm. 417.

(a) See *The Morning Light*, 2 Wall. 550.

stances, the steamer was responsible for the damage, her watch and lookout, though sufficient under ordinary circumstances, not being sufficient, considering the darkness of the night and the rate of speed of the steamer.¹ A large steamer, on her voyage from Kingston to Liverpool, came into collision at night with an outward-bound brig, which, in consequence of the collision, sunk immediately, with some of her crew. The night was dark, and the place of collision was a part of the Channel constantly navigated by vessels. The steamer was going at full speed; she carried lights, and had but one man on her lookout station. Although the brig carried no lights properly so termed, it was held that the steamer, in going at full speed, on such a night, in such a locality, and with one man only on the lookout, was improperly navigated and liable to the whole damage.² Steam-vessels, under such circumstances, are not justified by the English court of admiralty in going at the rate of ten knots an hour; if one, going at that rate, come into collision with another vessel, without either party seeing each other, the steamer will be held responsible for the damage.³ To constitute a good lookout, there must be a sufficient number of persons stationed for the purpose, who must know and be able to discharge that duty.⁴ (a)

§ 651. There is a rule of navigation, in respect to sailing vessels, which undoubtedly had its origin in the customs of navigation; and the obligation it imposes is thus stated by Lord Stowell to the Trinity Master, in the case of the “Woodrop Sims,”⁵ “that the law imposed upon the vessel having the wind free the obligation of taking proper measures to get out of the way of a vessel close-hauled, and of showing that it had done so; if not, the owners were responsible for the loss which had ensued. If they thought proper precautions were taken on board the ‘Woodrop,’ then it would be necessary to inquire whether the measures

¹ The Londonderry, High Court of Admiralty of Ireland. Pritch. Adm. Dig. 129.

⁴ The George, 2 W. Rob. 386. Jameson v. Drinkald, 12 Moore, 148.

⁵ The Woodrop Sims, 2 Dods. 83. And see Waring v. Clarke, 5 How. 441.

² The Iron Duke, 2 W. Rob. 377.
³ The Rose, 2 W. Rob. 2. See also The Perth, 3 Hagg. Adm. 414.

(a) Chamberlain v. Ward, 21 How. 548. New York Transp. Co. v. Philadelphia Steam Nav. Co. 22 How. 461. Haney v. Baltimore Steam Packet Co. 23 How. 287. The Europa, 2 Eng. L. & Eq. 557. Cushing v. The John Fraser, 21 How. 192.

were counteracted and defeated by improper measures taken by those on board the other ship." We have seen that the remedy in cases of collision lies either in the courts of common law, or in the admiralty court; and, at *nisi prius*,¹ the jury found the rule to be, that the ship which is going to windward is to keep to windward, and that ship that has the wind free is to bear away. In a case in the Exchequer, Bayley, B., said, that the party who has the wind should give way, and it is expected he will make room.² Therefore, a vessel sailing with the wind is bound to give way to one sailing by the wind; and the vessel sailing by the wind is not, in ordinary circumstances, obliged to alter her course.³ It was held in the high court of admiralty, in the case of the "Hope," that where a light vessel, with the wind free, meets with a laden vessel, close-hauled, it is the duty of the former to give way, and the latter is to keep her course; and if the night is so excessively dark that the persons on board the former vessel could see only a short distance from the vessel, this circumstance would only render it the more incumbent upon the crew to keep a good lookout, and not to depart from the general rule, unless compelled to do so by absolute necessity. Whoever sets up an exception to the rule, so important as the general rule, is bound to prove that facts and circumstances occurred which rendered the rule itself no longer applicable.⁴

¹ *Handyside v. Wilson*, 3 Car. & P. 528.

² *Vennall v. Garner*, 1 Crompt. & M. 21.

³ *Jameson v. Drinkald*, 12 Moore, 148. *Steamboat Co. v. Whilldin*, 4 Harring. Del. 228.

⁴ *The Hope*, 1 W. Rob. 154. See *Sills v. Brown*, 9 Car. & P. 601. In the case of the "De Cock," in the high court of admiralty, the "Parmelia" was proceeding up the channel, east by north, and the "De Cock" was coming down the channel, her course being northwest. The wind was nearly southwest; therefore the "Parmelia," which was sailing on the starboard tack, had the wind free. The night was dark and hazy, and although a good lookout was kept on board both vessels, a collision took place. Dr.

Lushington put the following questions to the two elder brethren of the Trinity House, by whom the court was assisted. First: "whether, under the circumstances of the case, the 'Parmelia,' sailing up channel, with the wind free, ought not, immediately on perceiving the 'De Cock,' to have given way?" Answer: "She ought to have altered her course." Secondly: "Then, suppose it was so, ought the 'De Cock,' seeing this state of things, to have attempted to luff up, or have kept her course, or have put her helm to port as she did?" Answer: "It was wrong to put her helm to port." The court held, upon these answers, that both vessels were to blame, and directed the amount of damage done by the 'De Cock' to be brought in and divided, and each

§ 652. We have seen that, in the case of carriage of passengers, by land, the established rule in England is, that in meeting each party shall bear or keep to the left, and that in this country the established rule is, that each party shall bear or keep to the right.¹ Were it left to chance, or to the hasty judgment of the moment, to choose the side each opposing carriage is to take, all safety would be gone; but as it is, the most casual observer in a populous English or American city must be struck by the precision with which the vehicles crowding its streets pass to and fro without injury or contact.² Ships at sea require a rule as well as carriages on land, but unfortunately they cannot be as easily comprehended, and are of much more difficult practical application. "The combination of circumstances, in which two meeting vessels find themselves, may be extensively varied by the state and direction of the wind, and the relative position of the vessels towards the wind and towards each other."³ It appears, that an order promulgated by the Trinity House Corporation in England, on the 30th of October, 1840, provides as follows: "Whereas the recognized rule for sailing vessels is, that those having the wind fair shall give way to those on a wind; that when both are going by the wind, the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each on the larboard hand; that when both vessels have the wind large or abeam, and meet, they shall pass each other in the same way on the larboard hand, to effect which two last-mentioned objects, the helm must be put to port."⁴ The replies elicited by questions addressed to wit-

party to pay their own expenses. 5 Month. Law. Mag. 303. 22 Am. Jurist, 464. See also the case of the *Speed*, 2 W. Rob. 225.

¹ *Ante*, § 549.

² See Art. in *Westm. Review*, Sept. 1844, p. 60.

³ *Westm. Review*, *supra*.

⁴ Explanation of the sea phrases used in the above order, and in the adjudged cases, — "Bear up," or "Bear away." To put the helm up (or to the windward or weather side) and keep a vessel away to leeward. "On a wind, close-hauled, on a bowline."

Applied to a vessel which is sailing with her yards braced up, so as to get as much as possible to windward. "Large, Free." Applied to a vessel sailing with a fair wind. "Larboard." The left side of a vessel looking forward. "Lee." The side opposite to that from which the wind blows. "A-lee." The situation of the helm when the tiller is put to the lee side. "Lee-way." When a vessel loses by drifting to leeward. "Luff." To put the helm "down" (or to the lee side), so as to bring the ship nearer the wind. "Port." To port the helm is to put

nesses by the select committee of Parliament on shipwrecks, state, as one of the causes of the many casualties happening by the collision of vessels at sea, the ignorance of, or inattention to, the Trinity Rules.¹ Although deriving their force from the Trinity Board, those rules are not really enacted by that corporation, being of date older far than its charter; but notwithstanding they are of immemorial authority, they have been so much doubted and misunderstood, that they seem to be attended by the uncertainties of oral tradition; and the only authoritative written exposition of them is derived through the perplexities of an analysis of the successive judicial decisions in the High Court of Admiralty;² and in truth they cannot be fully comprehended, and therefore not satisfactorily discussed, by one who has never known how to “hand,” nor “reef,” nor “steer.” They by no means constitute a law *per se*, but at the same time they are regarded by the English high court of admiralty as of authority.³ An alteration of a ship’s course being at all times inconvenient, when under sail, the alteration is usually made by one of the two ships only; and the rule is easily understood, that a vessel sailing free shall be the one to give way, and the expression “giving way” means not crossing a vessel’s bows, but going under her stern.⁴ When two vessels approach each other on opposite tacks, especially when one is close-hauled, and the other vessel has the wind free, the rule is that the latter must give way; but if both have the wind against them, the one on the larboard tack must give way, and the one on the starboard tack is to keep her course.⁵

§ 653. Two vessels may not be approaching each other in a straight line, or any thing like a straight line, and the courses they are pursuing may cross each other angularly. The application of the Trinity House regulations, with respect to two vessels meeting each other, the one upon the larboard and the other upon the

the tiller to the larboard side. “Starboard.” The right side of a vessel looking forward. To starboard the helm is to put the tiller to the starboard side. (Seaman’s Manual.) See Encyclopædia Britannica, Art. “Seamanship.”

¹ Westm. Review, *supra*.

² Ibid.

³ 2 Kent, Com. 230. And see the case of the Duke of Sussex, 1 W. Rob. 274; The Catharine, 2 Hagg. Adm. 145; The Ligo, 2 Hagg. Adm. 356; The Thames, 5 Rob. Adm. 345; The Dundee, 1 Hagg. Adm. 109.

⁴ The Rose, 2 W. Rob. 1.

⁵ The Seringapatam, 2 W. Rob. 506; 3 W. Rob. 38.

starboard tack, depends upon the presumption that the two vessels are directly approaching each other, and is not intended to apply when the heads of the respective vessels are lying in different directions. If one of the vessels is lying with her head to the S. E., and the course of the other is N. N. W. half W., it is obvious that the two vessels are not approaching with their heads opposing each other; and therefore it is held, the rule does not apply to the circumstances of the case.¹ Hence it appears, that no effectual single law can be devised to suit all circumstances, and it is usual to state the existing regulations in the form adopted by the Trinity Board. (*a*)

§ 654. In the case of the “Ann and Mary,” it was held, that in doubtful circumstances where there is a probability of collision, a vessel on the larboard tack, although close-hauled, is bound to give way to a vessel on the starboard tack, notwithstanding the latter may be sailing with the wind free. One peculiar feature in this case arises from the fact, that an action had at common law had been brought by the owners of the “Ann and Mary,” the vessel proceeded against, against the owners of the “Lady Clinton,” on account of the collision in question; and on the trial of that cause a verdict was found for the plaintiffs.²

§ 655. Rules founded on the like usages, and the general convenience of commerce, have been recognized by high authority in this country.³ (*b*) In the United States District Court in Massachusetts,⁴ it was certified by experienced navigators, and adjudged by the court as the rule of the subject, that when two vessels approach each other, both having a free or fair wind, each vessel passes to the right. The usage in the river Delaware is,

¹ The London Packet, 2 W. Rob. 213.

² The Ann & Mary, 2 W. Rob. 189. In the case of *The Traveller*, 2 W. Rob. 197, it was held to be the duty of the vessel on the larboard tack to give way to a vessel on the starboard tack, with-

out considering whether the other vessel be one or more points to leeward.

³ Story on Bailm. § 611 *a*. 3 Kent, Com. 230, 231. *The Brig Rival*, 1 Sprague, 128.

⁴ *Lowry v. The Steamboat Portland*, U. S. D. C. Mass. 1 Law Rep. 313.

(*a*) In England the rules of navigation are now regulated by orders in council, passed in pursuance of the act of 25 & 26 Vict. c. 63. See Appendix to Lushington Admiralty Reports, pp. lix, lxxii.

(*b*) The rules of navigation are now regulated by statute. Act of 1864, c. 69, art. 11–20, 13 U. S. Sts. at Large, 60; U. S. Rev. Sts. § 4233.

for vessels having the tide to keep further out; for those stemming the tide, nearer the shore: and such usage it is proper to consider in cases of collision.¹

§ 656. With regard to steam-vessels, they must always back their engines when hailed in a fog. The steamer "Perth" was going in a fog with unabated speed, on a track frequented by coasters, and there was no order given, when she was hailed, to stop her engines; and she was held liable to the amount and damages and costs in a suit against her for a collision which ensued.² In the case of the "James Watt," it was held, that, where a steamer coming down a river in a dark night meets a sailing vessel beating up the river, and the master of the steamer is in doubt what course the sailing vessel is upon, it is the duty of the master of the steamer to ease her engines and to slacken her speed, until he ascertains the course of the sailing vessel. In such a case, the defence that the master of the steamer immediately put her helm to port, in compliance with the Trinity House regulations, will not be sustained.³

§ 657. As a steam-vessel has greater power, and is more under command, she is bound always to give way to a sailing vessel. A steamer is indeed generally deemed as always sailing with a free and fair wind, and is therefore bound to do whatever a common vessel going with a free or fair wind would, under similar circumstances, be required to do in relation to any other vessels which it meets in the course of the navigation.⁴ In the case of the "Columbine," it was held, that if a steamer and a sailing-ves-

¹ Steamboat Co. v. Whilldin, 4 Harring. Del. 228.

² The Perth, 3 Hagg. Adm. 414. See also The Rose, 1 W. Rob. 274.

³ The James Watt, 2 W. Rob. 270.

⁴ Story on Bailm. § 611 b. Steamboat Co. v. Whilldin, 4 Harring. Del. 228. The Gazelle, 2 W. Rob. 515. Hawkins v. Dutchess Steamboat Co. 2 Wend. 452. Lowry v. Steamboat Portland, *ub. sup.* In a cause of collision against the "Shannon," a steam-vessel, the court, assisted by Trinity Masters, pronounced for damages and costs, holding that the steam-vessel, though on the starboard tack, being more under command, and mani-

festly having seen the other vessel, was to blame in not having given way. The Shannon, 2 Hagg. Adm. 173. A custom among the navigators of steamboats, on a river, to preserve particular situations, in ascending and descending, the Supreme Court of Alabama thought, would seem salutary and reasonable, and analogous to the rule governing ships passing each other at sea. Such custom, it was considered, would, if proved, bind navigators of steamboats to its observance, and a failure to observe it would be at the peril of the owners. Jones v. Pitcher, 3 Stew. & P. 135.

sel are approaching each other, and there is a probability of a collision, the general rule of navigation must be strictly adhered to; and neither haziness, nor the sailing-vessel being first descried from the starboard side of the steamer, affords a sufficient justification for the conduct of the steamer in departing from the rule.¹

§ 658. Two steamers may be sailing in opposite directions, and there may be a reasonable probability, if they continue their course, of their coming in collision. The regulation of the Trinity House in such case is drawn up with great precision, and is not difficult to comprehend; it is as follows: "When steam-vessels on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be risk of coming in collision, each vessel shall put her helm to port so as always to pass on the larboard side of each other." This rule, emanating from the Trinity House, although it cannot be considered as constituting law *per se*, is nevertheless adopted as a rule in the admiralty; and the English high court of admiralty consider it important that it should be distinctly understood, that they should consider the rule of binding authority upon the owners of steam-vessels. If the masters of such vessels, that court have announced, shall think fit not to comply with the rule in question, in so doing they will be guilty of unseamanlike conduct, and their owners will be responsible for the consequences that may result from their disobedience of it. But the obvious meaning of the rule is held to be, that it is intended to apply whenever two steam-vessels are approaching each other in contrary directions, and there is a reasonable probability, that, by standing on, a collision may ensue; not, only where such collision is inevitable. If no reasonable apprehension of a collision is to be entertained, and the observance of the rule would unnecessarily throw each vessel out of its course, it would be an absurdity to suppose that under such circumstances the rule was intended to apply.² Mr. Justice

¹ The Columbine, 2 W. Rob. 272.

² By Sir Stephen Lushington, in the case of the Duke of Sussex, 1 W. Rob. 274. The above-mentioned rule of the Trinity House, requiring steam-boats to pass each other on the larboard side, was expressly enjoined by the State of New York, more than twenty years ago, by statute. N. Y.

Rev. Stat. Part. I. tit. 10, § 1. By the Stat. 9 & 10 Vict. c. 100, § 9, every steam-vessel, when meeting or passing any other steam-vessel, shall pass as far as may be safe on the port side of such other vessel, and every steam-vessel, navigating any river or narrow channel, shall keep as far as practicable to that side of the fair-way or mid-

Woodbury, in a case decided in the Supreme Court of the United States, observed that there is no such rule as that prescribed by the Trinity House, in this country, though he considered the principle on which it rested a sound one.¹ This meaning undoubtedly is, that no such rule has yet been recognized as obligatory by any authoritative judicial decision. If it should be shown in this country that there is a usage well established to that effect, it may be supposed that our courts would not hesitate to enforce it.²

§ 659. In a cause of collision in the admiralty, against a steam-vessel, for damage occasioned to her by another steam-vessel, the grounds of defence were twofold: first, an alleged custom, superseding the Trinity House rule; and secondly, that the circumstances of the case were such that the rule had no application in that instance; or, in other words, that the two vessels were pursuing courses so widely distant from each other, that there was no reasonable probability that a collision would have occurred. The facts set forth were, that the steamer "Lightning" was proceeding up the river Thames, and had arrived in the Half-way Reach, about five miles from Woolwich, when the steamer "Duke of Sussex" was seen coming down with the tide "end on" towards the "Lightning;" that when the two vessels had approached to within about a quarter of a mile of each other, it was obvious to the persons on board the "Lightning," that if both vessels continued their respective courses, a collision would probably ensue. The helm of the "Lightning" was accordingly put to port, in conformity with the rule of the Trinity House, but the helm of the "Duke of Sussex," instead of being put in like manner to port, was put to starboard, and in a few seconds she ran her bowsprit into the "Lightning's" paddle-box, breaking the paddle and wheel by the collision. The defence set up by the owners of the "Duke of Sussex" was, that the tide, at the time the collision occurred, was about one-third ebb; that the full force of the ebb tide was northward of Half-way Reach, and that it was

channel of such river or channel which lies on the starboard side of such vessel, due regard being paid to the tide, and to the position of each vessel in such tide; and the master or other person in charge of such vessel neglect-

ing to observe such regulations, shall for each default be liable to a penalty not exceeding £50.

¹ Waring v. Clarke, 5 How. 441.

² Conkl. Adm. Jurisdict. 311.

the practice and custom of steam-vessels coming up the river to keep to the south side of the mid-channel, and those going down to adhere to the north side; that the "Duke of Sussex" was pursuing the usual course, and if the "Lightning" had done the same, the two vessels might have passed clear of each other; that there was no necessity for the persons on board that vessel to have ported her helm, and it was only in consequence of the "Lightning's" deviation from the customary rule that the collision was occasioned. Sir Stephen Lushington said: "Supposing the custom to exist as stated, it can only be acknowledged where there is an open way for each vessel to pass without any risk of a collision. In the present case it is directly averred, on the part of the 'Lightning,' that the two vessels were approaching each other 'end on;' in which case I distinctly lay it down as my opinion, that the rule was to be observed, and the custom, if any such custom exist at all, be superseded. If there be any risk, convenience must give way to the rule; if it were otherwise, the masters of steam-vessels would always be looking out for circumstances to justify them in departing from the rule; the rule would be disregarded for the sake of a little more or less convenience, and the greatest uncertainty would ensue in consequence." With these observations he left the first part of the defence for the Trinity Masters to determine how far it was imperative upon the owners of the "Duke of Sussex" to observe the rule. Upon the second part of the defence he relied on their judgment to decide, whether the two vessels were so far distant from each other as to render it altogether unnecessary for the "Lightning" to have ported her helm under the circumstances of the case. If, under the facts disclosed, there was a reasonable probability of collision, he apprehended it was clear that the "Lightning" acted properly, and that the "Duke of Sussex" was to blame. The reply of the Trinity Masters was: "The 'Lightning' was thrown into the middle of the river to avoid some colliers; and, under the circumstances of the case, we think there was such a probability of a collision, that the 'Lightning' adopted the right course, and the accident was caused by the misconduct of the 'Duke of Sussex.'" ¹

§ 660. We have seen that the rules of the road to be observed by carriers of passengers by land are not inflexible, although if

¹ The Duke of Sussex, 1 W. Rob. 274.

they are disregarded more care must be exercised, and a better lookout kept to avoid collision than would be necessary, provided they were strictly observed; ¹ and situation and circumstances, it was said, may frequently arise where a deviation from the acknowledged rules would not only be justifiable, but absolutely necessary. ² The same doctrine is applicable to carriers of passengers by water; and a vessel is not to be run into because she is out of place. ³ (a) Mr. Chief Justice Best, in a case of collision of vessels, at *nisi prius*, in summing up, said that he agreed, that although there might be a rule of the sea, yet a man who has the management of one ship is not to be allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by pursuing a different course; but if the matter comes into any doubt, as, for instance, in the case of a dark night, then the rule is to regulate the parties. ⁴

§ 661. The rules of the sea, in respect to navigation, it is always admitted, are subordinate to the rule prescribed by common sense. Thus, if a vessel goes so near to a rock on the land, that, by following the rules, she would inevitably get on shore, no rule should prevail over the preservation of property or of human life. ⁵ It was urged in the case of the "Hope," ⁶ that if it was in the power of one of the vessels which came into collision to have avoided the collision by giving way, she was bound to have done so, notwithstanding the rule of navigation. This the court admitted to be true, as a general proposition, and said that "no vessel should unnecessarily incur the probability of a collision by a pertinacious adherence to the strict rule of navigation." "If a steam-vessel," said the court, "should, for instance, be nearing another sailing-vessel, and such vessel should be steered erroneously; if the

¹ *Ante*, § 549 *et seq.*

² *Lowry v. The Steamboat Portland*, 1 Law Rep. 313.

³ *Cummings v. Spruance*, 4 Harring. Del. 315. *Vanderbilt v. Richmond Turnp. Co.* 2 Comst. 479. Steamboats in the river Mississippi are not necessarily liable for sinking flat-boats, by being out of the usual channel, for the purpose of obtaining wood, passengers, or freight; there

must be some negligence on the part of the officers of the steamboat, in order to render her liable. *Western Belle v. Wagner*, 11 Misso. 30.

⁴ *Handyside v. Wilson*, 3 Car. & P. 528.

⁵ *The Friends*, 1 W. Rob. 478. And see *Hawkins v. The Dutchess Steamboat Co.*, 2 Wend. 452.

⁶ *The Hope*, 1 W. Rob. 154.

(a) *Steamboat Farmer v. McCraw*, 26 Ala. 139.

master of the steam-vessel should wilfully say, 'This vessel is steering wrong, but we will keep our course,' and a collision ensues in consequence, I should undoubtedly hold the steam-vessel was to blame." But the steam-vessel would be exonerated if the sailing vessel was steering wrong, and the former did not strictly comply with the rule of navigation if she did all that was reasonable under the circumstances, and a collision unintentional should take place between them. A steam-vessel going down channel in a dark night, on seeing the lights of a ship ahead, ported her helm, but did not put it hard a-port in the first instance. The ship, which was coming up channel, mistook the lights of the steam-vessel for those of a lugger at anchor, and starboarded her helm for the purpose of passing within hail of her, in consequence of which a collision took place. It was held that the steamer, though the collision would have been avoided had she put helm hard a-port in the first instance, did all she was called upon to do, having reason to expect that the ship would either have kept her course, or put her helm to port; and that the ship was in culpable error, in starboarding instead of porting her helm, as some uncertainty must have existed as to the character of the vessel carrying the lights, and that she was, therefore, liable for the damage occasioned by the collision.¹

§ 662. In *Lowry v. The Steamboat Portland*,² the learned district judge (Davis) took the opinion in writing of some distinguished nautical men under oath, who, among other things, returned this answer: "In our answers to former questions, we have stated the rule or usage to be, that when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard tack shall give way, and thus each pass to the right. This rule should govern vessels, too, sailing on the wind, and approaching each other, when it is doubtful which is to windward. But if the vessel on the larboard tack is so far to windward that if both persist in their course the other will strike her on the leeward side abaft the beam, or near the stem, in such case the vessel on the starboard tack must give way, as she can do so with greater facility, and less of time and distance than the other. These rules are particularly intended to govern vessels

¹ *The Sappho*, 9 Jur. 560.

² *Ante*, § 655; *Steamboat Co. v. Whilldin*, 4 Harring. Del. 228.

approaching each other, under circumstances that prevent their course and movements being readily ascertained with accuracy; for instance, in a dark night or dense fog. At other times, circumstances may render it expedient and proper to depart from them; for we consider them all subordinate to the rule prescribed by common sense, and applicable to all cases, under any circumstances, which is, that every vessel shall keep clear of every other vessel, when she has the power to do so, notwithstanding such other may have taken a course not conformable to established usage. We can scarcely imagine a case in which it would be justifiable to persist in a course, after it had become evident that collision would ensue, if by changing such course the collision could be avoided."

§ 663. In an action at common law (on the case) brought to recover damages for an injury sustained by the plaintiff in consequence of the running of a steamboat upon a sloop belonging to the plaintiff, while navigating the river Hudson, it appeared on the trial that the two vessels met just below the overslaugh below Albany. The sloop was going down the river with a fair but light breeze at the rate of two miles an hour, and the steamboat was going up the river at the rate of six or seven miles an hour. The sloop had just crossed the bar in the usual channel, and necessarily ran near the eastern shore; the steamboat was also close in on the same shore; the officers of both vessels hailed; the plaintiff on board his sloop called to the officers of the steamboat to stop the engine; the pilot of the boat called to the plaintiff, who was at the helm of his sloop, to bear away; the plaintiff did bear away, but, as he had but little headway on his vessel, he made but little progress. The engine of the steamboat was stopped, but the boat was not backed, as she might have been, and struck with her bow the waist of the plaintiff's sloop, and injured her materially. The verdict being for the plaintiff, it was moved to be set aside, but a new trial was denied; the court, by Savage, C. J., saying: "The real question is, whether the officers of the steamboat were not guilty of negligence in refusing or neglecting to exercise the power they possessed, which would have prevented the injury. The boat was perfectly under the control of its officers, the sloop was not; the officers of the boat did not endeavor to avoid the collision, which they might have done, either by backing their boat, or by going on the west side

of the sloop, where there was room enough and water enough. The sloop was compelled to go near the east shore in order to pass the bar with safety; and, after passing the bar, the captain did all in his power to avoid the collision, by endeavoring to go west of the boat; but, from the slow motion of his sloop, this was impracticable, before the boat struck him. This appears a strong case of negligence, if not of wilful injury.”¹

§ 664. The owner of a vessel which, through the fault or negligence of any one on board, injures another vessel by running afoul of her, is liable to the injured party, although there is a pilot on board who has the entire control and management of the vessel.² (a) It is more convenient, it is held, that the owner of

¹ *Hawkins v. The Dutchess Steam-boat Co.* 2 Wend. 452. *Condry*, 1 How. 28. *Bussy v. Donaldson*, 4 Dallas, 206. *Fletcher v.*

² *Yates v. Brown*, 8 Pick. 22. *Shaw Braddick*, 5 Bos. & P. 182. And see *v. Reed*, 9 Watts & S. 72. *Smith v. ante*, § 193, n.

(a) In England it is provided by statute that no owner or master of a vessel shall be liable for any loss or damage happening by the neglect, default, or incompetency of the pilot in charge. 6 Geo. 4, c. 125, § 55. The act contains a section which provides that the act shall not extend to ports in regard to which special provisions have been made in any act of Parliament. This excludes from the operation of the act the ports of Liverpool and Newcastle. The acts relating to these ports provide that the master shall take a pilot or shall pay half pilotage, and such a taking has been held compulsory, and the owners not liable for the act of the pilot. *Rodrigues v. Melhuish*, 10 Exch. 110; 28 Eng. L. & Eq. 474. *The Montreal*, 24 Eng. L. & Eq. 580. *The Maria*, 1 W. Rob. 95. *The Agricola*, 2 W. Rob. 10. The pilotage acts in this country are generally similar to the Liverpool and Newcastle acts in this respect, and it would seem that the same rule of construction should govern. This seems to be the opinion of Mr. Justice Curtis in *The Carolus*, 2 Curtis, C. C. 69, though the point was not decided. An outward-bound vessel has a choice of pilots, and the doctrine of compulsion would not apply. The cases in this country are of this class chiefly, though in some it does not appear whether the vessel was outward-bound or homeward-bound. See *The Julia M. Hallock*, 1 Sprague, 539; *The Steamboat Rescue*, 2 Sprague, 16; *Yates v. Brown*, 8 Pick. 23; *Bussy v. Donaldson*, 4 Dall. 206; *Williamson v. Price*, 16 Mart. La. 399; *Smith v. The Creole*, 2 Wall. C. C. 485. If the master is obliged to take the first pilot who offers or to pay half pilotage, the doctrine of compulsion would seem to apply to homeward-bound vessels as well as under the English statutes. It may also be questioned whether the relation between the owner of the vessel and the pilot is not that of contractor and contractee, rather than that of master and servant. See *Linton v. Smith*, 8 Gray, 147, and cases cited, § 575. It has, however, been held by the Supreme Court of the United States that, although the pilot is taken by com-

such vessel should seek his remedy against the pilot, whom he has selected for this service, than that the injured party should. It is also, it is held, more conformable to the general spirit of the law; for although the pilot holds his commission under government, yet in many respects he is the servant of the owner who employs him, and in regard to the time of sailing is undoubtedly under the direction of the owner. The master, in such case, would not be liable, for he is answerable only in respect of his authority over the vessel, which authority is entirely suspended by that of the pilot, when the vessel is under sail, within pilot ground.¹ In *Snell v. Rich*, in New York, the vessel which ran foul of another vessel lying at anchor, and carried away her bowsprit, was sailing at the time out of the harbor with a pilot on board, and the master at the time was on shore; and Livingston, J., said: "It is universally understood that the pilot, while on board, has the absolute and exclusive control of the ship; and I am prepared to say, that if the master had been on board he would not have been responsible."² In the case of the ship *Massachusetts*, in the English high court of admiralty,³ a collision was occasioned by the dragging of her anchor, and, in

¹ Opinion of the court by Parker, C. J., in *Yates v. Brown*, *ub. sup.* In this case, it appeared on trial, that the "Napoleon," when sailing out of the harbor of Boston, bound on a foreign voyage, with a pilot on board, came in contact with the "Only Son," which was lying in the stream, by which the bowsprit of the "Only Son" was injured. One of the defendants was on board the "Napoleon" when the accident happened. A verdict having been found for the plaintiffs, which settled the amount of damage, and the fact of the mismanagement of the defendant's vessel, the question was reserved for the whole court, whether, there being a person duly authorized to pilot the "Napoleon," the owners of the vessel were liable for an injury from negligence or mismanagement in navigating

the vessel out of the harbor. The captain of a sloop of war, it has been held, is not liable for damage done by her running down another vessel; the mischief appearing to have been done during the watch of the lieutenant, who was upon deck, and had the actual direction and management of the steering and navigating of the sloop at the time, and when the captain was not upon deck, nor was called by his duty to be there. The master was a captain in the naval service, and had no power of appointing the officers or crew on board; and there is no reason for making one man liable for the acts of another whom he did not appoint or employ. *Nicholson v. Mounsey*, 15 East, 384.

² *Snell v. Rich*, 1 Johns. 304.

³ The *Massachusetts*, 1 W. Rob. 371.

pulsion, the vessel is liable *in rem* for a collision caused solely by the pilot's fault. The *China*, 7 Wall. 53. The *Merrimac*, 14 Wall. 199.

consequence, driving against the bows of the “Bulfinch;” the anchor being too light to hold the ship. It was held, that the owners of the damaging ship were not exempted from responsibility by the fact of having a licensed pilot on board at the time, under the provisions of the statute 6 Geo. IV. Dr. Lushington, in addressing the Trinity Masters, said: “If you are of opinion that the accident arose partly from the fault of the pilot in not coming to an anchor in sufficient time, and partly from the defective weight of the anchor, the legal consequence is, that the damage having arisen from the joint default of the pilot and the owners, the responsibility of the loss must fall upon the owners of the ship.” That is, although, by the aforesaid statute, the owners are exempted from responsibility in case of accidents, when there is a licensed pilot on board, they would not be, even by the force of the statute, if the accident was owing in any degree to the fault of the master.¹

§ 665. When a collision occurs in the port of a foreign country, the rights and responsibilities will depend on the laws of that country as interpreted by its judicial tribunals. By some of the English pilotage statutes (6 Geo. IV., c. 125), neither the master nor the owner of a vessel is answerable for damage occasioned entirely by the fault of the pilot;² and in case of a collision between two American vessels in an English port, the rights of the

¹ The “Girolamo,” an Austrian vessel left the London Docks with a licensed pilot on board, towed by a steam-vessel. After she had passed Blackwall, a fog came on, during which she ran foul of the “Edward,” a British convict ship, moored below Woolwich, in the proper berth for such vessels. Sir John Nicholl said: “Did the accident arise from the ‘neglect, default, or incapacity’ (the words of the act 6 Geo. IV.) of the pilot? or was the master *in pari delicto*? It occurred from the vessel going on in the fog, not from the want of bad steerage, want of knowledge of shoals, or any incapacity as pilot, but from proceeding at all. It seems to be nearly admitted, that if the vessel had set off in this fog, blame would have been imputable to the master; if so,

was he not blamable in going on in the fog? Had he not a right to resume his authority? Did he not owe it to his owners and to other persons, whose property might be damaged by collision, to insist on bringing the vessel up? Was not the master in duty bound at least to remonstrate with the pilot, and to represent the danger of proceeding? Yet he says in his affidavit, ‘he did not in the least interfere.’ In this aspect the case is, as far as I am aware, new, and one of too much difficulty to arrive at any hasty decision upon, unless there be no other points upon which the case may be disposed of.” 3 Hagg. Adm. 176, and Abbott on Shipp. (5th Am. ed.) 300 n. (b).

² Carruthers v. Sydebotham, 4 Maule & S. 77.

parties, it has been held, will depend, in a suit in this country, upon the provisions of these statutes. It was so determined by the Supreme Court of the United States, in *Smith v. Condry*,¹ in which Taney, C. J., in giving the opinion of the court, says: "The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes then in force; and if doubts exist as to their true construction, we must of course adopt that which is sanctioned by their own courts." The leading principle of the legislature in England, in exonerating owners of vessels from any damage occasioned by their vessels having pilots on board, is, that the masters are compellable to take such pilots on board, and the owners are not responsible for the acts of persons to whom they are thus forced to commit the management of their property, and over whom they have no control.² It may be inferred, says Lord Tenterden, from two cases considered together, which were cited with respect to a Liverpool pilot,—one in the Court of King's Bench,³ and the other in the Court of Exchequer,⁴—that where the master is bound by an act of Parliament, under a penalty, to place his ship in charge of a pilot, and does so accordingly, the ship is not to be considered as under the management of the owners, or their servants; but when it is in the election or discretion of the master to take a pilot or not, and he thinks fit to take one, the pilot so taken is to be considered as a servant of the owners. Under what circumstances the master is thus bound to place his vessel

¹ *Smith v. Condry*, 1 How. 28. It appears by the case of the "Vernon," that the provisions of 6 Geo. IV. equally apply in cases where the damage is done by a British ship to the property of foreigners, as in cases entirely between British subjects, upon the principle, that, when a remedy is sought to be obtained, the party seeking it must take it according to the law of the country in which it is to be enforced. The *Vernon*, 1 W. Rob. 316. (a)

² The *Maria*, 1 W. Rob. 95. And see cases cited *ante*, § 193, n. 3. See

the different acts of Parliament on the subject of pilots and pilotage compared and commented on by Mr. Chief Justice Taney, in *Smith v. Condry*, *ub. sup.* The *Protector*, 1 W. Rob. 45. That the construction of the different pilot acts in England has not been uniform. The *Agricola*, 2 W. Rob. 10. *Mackintosh v. Slade*, 6 B. & C. 657.

³ *Carruthers v. Sydebotham*, 4 Maule & S. 77.

⁴ *Attorney-General v. Case*, 3 Price, 302.

(a) See also *Gen. Steam Nav. Co. v. Guillou*, 11 M. & W. 877; *The Johann Friederich*, 1 W. Rob. 35.

under the charge of a local pilot must depend upon the provisions of the local law, by which the duty of taking a pilot is imposed upon the master. The master is not answerable for the misconduct or awkwardness of a person whose appointment is, by public authority, taken out of his hands.¹ The appointment of pilots and the regulation of pilotage, have been hitherto left by the Congress of the United States to the State Legislatures; and the act of Congress of 1789, ch. 10, expressly recognizes and confirms the regulations made on this subject by the State Legislatures.² (a)

§ 666. In *Reeves v. The Ship Constitution*, in the District Court of the United States, for the Eastern District of Pennsylvania, the libellants claimed compensation under the following circumstances: The steamboat "William Wray," belonging to the libellants, was employed in towing the ship "Constitution," to which she was fastened, up the river Delaware. There was a licensed pilot on board the ship, under whose directions both vessels were steered. In the course of the passage, they came in contact with a schooner sailing on the river, by reason of which the steamboat sustained considerable injury. The libel was dismissed with costs, Judge Hopkinson holding, that where a steamboat is hired for the purpose of towing a vessel to which she is fastened, and both are under the direction of a licensed pilot, the owner of the steamboat is not entitled to damages on account of injury sustained in the course of the navigation, and not caused by undue negligence of the pilot.³

¹ Abbott on Shipp. (5th Am. ed.) 278. See the case of the *Fama*, 2 W. Rob. 84.

² *The Carolus*, 2 Curtis, C. C. 69. And see *Shaw v. Reed*, 9 Watts & S. 72. For cases arising under the State pilot laws, see the extensive n. to p. 176, of (6th ed.) of Kent's Com. It is the duty of the master engaged in the foreign trade, says Kent, to put his ship under the charge of a pilot both on his outward and homeward voyage, when he is within the usual limits of the pilot's employment. The pilot, while on board, has the exclusive

control of the ship. He is considered as master *pro hac vice*, and if any loss or injury be sustained in the navigation of the vessel while under the charge of the pilot, he is answerable, as strictly as if he were a common carrier, for his default, negligence, or unskilfulness; and the owner would also be responsible to the injured party for the act of the pilot, as being the act of his agent. 3 Kent, Com. (5th ed.) 176. And see *ante*, § 193, n.

³ *Reeves v. The Constitution*, Gilpin, 579.

(a) See *Cooley v. Port Wardens*, 12 How. 299; *Steamship Co. v. Joliffe*, 2 Wall. 450.

§ 667. It was contended in Massachusetts,¹ that the principle which holds the owner of a vessel liable for the acts of the pilot who may have charge of her, would render the owner of a vessel liable for the negligence of the master of a steamboat who has such vessel in charge in the employment of towing her. A schooner called the "Triton," it appeared in that case, was lying at anchor in the river Mississippi, a few miles below New Orleans, when a steamboat called the "Grampus" came down, having a ship lashed on each side, and a brig called the "Burton" towed astern by a hawser of about thirty fathoms in length; the steamboat, when thus employed, passed so near the schooner that the ship on her larboard side just cleared the schooner, and a collision between the brig and the schooner took place; for which an action on the case was brought by the owners of the schooner against the owner of the brig. The evidence tended to show, that, in consequence of the bad management of those who had charge of the steamboat, the brig in tow, without any culpable negligence of those who had charge of her, was thrown out of the track of the steamboat, and so caused the collision. In reference to which the jury were instructed, that if the collision took place through the negligence, unskilfulness, or misconduct of those who had charge of the steamboat, the owner of the brig was not liable; to which instruction the plaintiffs excepted, the jury having found a verdict for the defendant. The question which was raised, the court considered, was, whether the master and crew of the steamboat could be legally considered as the servants of the defendant. The court acknowledged the difficulty of determining what facts and circumstances, in legal contemplation, go to establish the relation of superior and subordinate, or of employer and employee, in such a manner as to give effect and application to the rule. As the case of a vessel towed by a steamboat was new, and could not have been anticipated by the founders of the common law, the court, in deciding the question, applied what they considered to be established principles and analogous cases; and had recourse to the authorities as reviewed in *Bush v. Steinman*,² and *Laugher v. Pointer*.³ Tried by these principles and authorities, it was held the defendant was not responsible for damages

¹ *Sproul v. Hemmingway*, 14 Pick. 1.

³ *Laugher v. Pointer*, 5 B. & C.

² *Bush v. Steinman*, 1 Bos. & P. 547, and *ante*, § 575.

attributable to the default of the master and crew of the towing steamboat. "They were not," said Mr. Chief Justice Shaw, "the servants of the defendants; were not appointed by him; did not receive their salaries from him; the defendant had no power to remove them; had no power to order or control them in their movements; had no contract with them, but only through them, with the owners of the steamboat, for a participation in the power derived from the public use and employment of that vessel, by her owners. After making such a contract, it was perfectly in the power of the owners of the steamboat to appoint another master, pilot, and crew, and the defendant would have had no cause of complaint."¹(a)

¹ "Nor," said the learned judge (for, on account of the importance of the question, and the probability of its often arising, we give the rest of his able opinion), "can the master and crew of the steamboat, in any intelligible sense, be considered as in the employment or business of the defendant, any more than a general freighting ship, her officers and crew, can be considered as in the employment of each freighter of goods, or the master and crew of a ferry-boat, in the employment of the owners of each coach, wagon, or team transported thereon. The steamboat was engaged in an open, public, distinct branch of navigation, that of towing and transporting vessels up and down the Mississippi, for a certain toll or hire, for the profit of the owners. The defendant seemed to have the same relation to the steamboat that a freighter has to a general ship or a passenger to a packet. The defendant participated in the benefit but

incidentally and collaterally; he did not share in the profits of the business, one which, from its magnitude, may well be called the trade of towing. Such a trade may be considered as much a public and distinct employment as that of freighting or conveying passengers. The steamboat was in no sense in the possession of those whom she was employed to tow. If it is contended that the defendant is liable, on the ground that the steamboat was, for the time being, in his possession, occupation, or employment, then it would follow that the defendant would be liable for the negligence of the officers and crew of the steamboat, as well whether the plaintiff's vessel was struck by the defendant's vessel, the "Burton," as struck by either of the other vessels towed, or by the steamboat herself; which cannot for a moment be contended. The case may well be illustrated by considering the condition of one of the side vessels, firmly lashed to the

(a) See *The Carolus*, 2 Curtis, C. C. 69; *The Steamboat Rescue*, 2 Sprague, 16; *The R. B. Forbes*, 1 Sprague, 328, and affirmed in the Circuit Court; *Cushing v. Ship John Fraser*, 21 How. 184; *The Christina*, 3 W. Rob. 27, affirmed *Petley v. Catto*, 6 Moore, P. C. 371; *Smith v. The Creole*, 2 Wall. C. C. 485; *The Steam-Tug Sampson*, 3 Am. Law Register, 337; *The Duke of Sussex*, 1 W. Rob. 270; *The Gipsey King*, 2 W. Rob. 537; *The Kingston-by-Sea*, 3 W. Rob. 152.

§ 668. But although the owners of the steamboat in the above case were not liable for their negligence to the owner of the schooner, they would have been liable for their negligence to the owners of the vessels they had in tow for any injury occasioned to them in consequence of it. The owners of steamboats, when employed in their ordinary business of transporting goods, are liable to the full extent of common carriers;¹ but whenever they are employed out of the course of such their ordinary business, as in the instance of towing a freight vessel, the owners are held to no more than ordinary careful management, and the law of common carriers is not applicable to them.² In one case it was held, that the owners of a steamboat who undertook, for hire, to tow a canal-

steamboat, and governed wholly by its movements. The payment for the privilege of being thus moved or transported is precisely like freight paid for heavy luggage, timber or spars, for instance, carried in or upon a ship. The whole conduct and management is entirely under the control of the master and crew of the towing vessel in the one case, as it is of the freighting ship in the other. If collision takes place between the side ship, thus firmly lashed, and another vessel, it is as directly attributable to the steamboat, and her officers and crew, as if the steamboat herself had come into collision with the other vessel. The towed ship is the passive instrument and means by which the damage is done. But there is no difference, in this respect, between the condition of one of the side ships and a ship towed astern, except this, that on board a ship towed astern by means of a cable, something may and ought to be done by the master and crew, in steering, keeping watch, observing and obeying orders and signs; and if there be any want of care and skill in the performance of these duties, and damage ensue, then the case we have been considering does not exist; the damage is attributable to the master and crew of the towed ship, and they and their owners

must sustain it. The jury were so instructed at the trial, and it was left to them to find, whether the damage was caused by the negligence of the one or the other. Then, supposing all duties faithfully performed on board the towed vessel, and the damage to be caused by the negligence or misconduct of the master and crew of the steamboat, there is no difference between the case of the side ship, which is wholly passive, and the ship astern, which is partially so. The case most nearly resembling this, perhaps, is that of a vessel chartered, where for a certain time the whole use and benefit of the ship is transferred to the charterers, but the officers are appointed, and the crew engaged and subsisted by the owners; in which case it is held, that the owners, and not the charterers, are responsible to third persons for any damage occasioned by the negligence of the officers and crew." *Fletcher v. Braddick*, 5 Bos. & P. 182.

¹ *Ante*, § 83.

² *Caton v. Barney*, 13 Wend. 387. *Pennsylvania Nav. Co. v. Dandridge*, 8 Gill & J. 109, and *ante*, § 86. Even an express promise to tow safely is but an undertaking to tow with ordinary care, and does not create the obligation of a common carrier. *Ante*, § 60.

boat and her cargo on the river Hudson, were absolved from the obligation of the exercise of even ordinary care, by a stipulation that the canal-boat was to be towed at the risk of her master; but that they were still liable for negligence so gross as to be confounded with fraud.¹ If no negligence can be proved on the part of a steamer for damage occasioned in such cases, the owners, of course, are not responsible either to the vessel in tow or to the owners of a vessel injured by her coming in contact with the vessel in tow.²

§ 669. Loss by collision of vessels, it must be perceived, has been a difficult subject for discussion and decision, and the evidence as to the real cause of collision is of difficult access. The accident usually happens in the darkness of the night, or in a fog, or in a storm, and is necessarily accompanied with confusion and agitation.³ Where the evidence on both sides is conflicting and nicely balanced, courts of admiralty are guided by the probabilities of the respective cases which are set up; but the law requires that there should be preponderating evidence to fix the loss on the party charged, before the court can adjudge him to make compensation.⁴ *A priori*, the presumption, as we have already said, is, that the master of a vessel would do what was right, and follow the correct and regular course of the navigation.⁵

¹ *Alexander v. Greene*, 3 Hill, 1. But in a case in the District Court of the United States for the Eastern District of Pennsylvania, *Kane, J.* stated considerations for holding a steam-tug to the rigid accountability of a common carrier, in opposition to the case of *Alexander v. Hill*. A captain of a steam-tug is the pilot of the voyage, and is the best judge of the sufficiency of the canal-boat, taken in tow, to resist the weather, and of the adequacy of her crew to do what may be required for her protection, and cannot limit his responsibility by a notice given at the time of commencing the voyage that it must be at the risk of the owner of the canal-boat. The steam-tug, notwithstanding such notice, is bound for the exercise of all that skill and care which the circumstances of the case

demand. *Vanderslice v. Steam Tow-Boat Superior*, 13 Law Rep. 399.

² *The Duke of Sussex*, 1 W. Rob. 270.

³ 3 Kent, Com. 230. Miscellaneous cases relating to collision: *The Freya*, 5 Rob. Adm. 75; *The Thames*, 5 Rob. Adm. 345; *The Agricola*, 2 W. Rob. 10; *The Blenheim*, 10 Jur. 79; *Secombe v. Wood*, 2 Moody & R. 290. Of the effect of a verdict in an action at law on a suit in a court of admiralty, with respect to the same collision: *The Ann & Mary*, 2 W. Rob. 189; *General Steam Nav. Co. v. Tonkin (The Friends)*, 4 Moore, P. C. 321. Costs in causes of collision: *The Washington*, 5 Jur. 1067; *The Itinerant*, 2 W. Rob. 244.

⁴ *The Ligo*, 2 Hagg. Adm. 356.

⁵ *The Mary Stewart*, 2 W. Rob. 244; *The Alexander Wise*, 2 W. Rob.

§ 670. The testimony of the persons on board the respective vessels is admitted *ex necessitate rei*, which rule is considered one of the exceptions to the general rules of evidence adopted in courts of admiralty, excluding the testimony of a witness directly interested in the event of the suit. (a) Upon this ground the crew of the vessel charged with committing the damage were admitted as witnesses in the case of the "Catherine," of Dover,¹ though, being sharers in the profits and loss of the vessel, they would not swear they were disinterested in the result. This exception to the general rule of the law of evidence gave occasion

65. Where it is shown that the vessel charged as the wrong-doer omitted an ordinary and proper measure of prevention, the burden is on her to show that the collision was not owing to her neglect, but would have happened, nevertheless, if the precaution had been taken. Thus, where the respondent's vessel was intentionally left at her moorings in a harbor, to encounter an approaching gale, without any person on board, and during the night she dragged her anchors, and ran foul of the libellant's vessel, it was *held* to be incumbent on the respondents to show that the misfortune was not attributable to this cause. *Clapp v. Young*, U. S. D. C. Mass. 6 Law Rep. 111. A like principle has been asserted by the supreme court of the United States,

with respect to the non-observance of the precautions against collision enjoined by the act of Congress of July 7, 1838, c. 191, and the amendatory act of March 3, 1843, c. 94. The 10th section of the former act requires the master and owners of every steamboat running between sunrise and sunset to carry one or more signal lights. In a case before the court, which was that of a collision between two steamboats on the Mississippi River, the respondent's vessel had omitted this precaution, and the court *held*, that this alone was sufficient to cast the burden of proof to show that the injury done by their steamer was not the consequence of the omission. *Waring v. Clarke*, 5 How. 441.

¹ The *Catherine of Dover*, 2 Hagg. Adm. 145.

(a) Ch. 189, acts of 1862, 12 U. S. Sts. at Large, 588, provides: "That the laws of the State in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, in equity and admiralty." Ch. 210, acts of 1864, § 3, 13 U. S. Sts. at Large, 351, provides: "That in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions, because he is a party to, or interested in, the issue tried." This last act is amended by c. 113 of acts of 1865, 13 U. S. Sts. at Large, 533, as follows: "That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." These acts are incorporated in U. S. Rev. Sts. § 858.

to Sir William Scott, afterwards Lord Stowell, to say, that “the testimony of witnesses is apt to be discolored by their feelings, and the interest which they take in the success of the cause; and the court too frequently has to decide upon great diversities of statement as to the courses the vessels were steering, or to the quarter from which the wind was blowing at the time when the accident occurred.”¹

§ 670 *a*. With respect to damages to be awarded and apportioned in cases of collision, the jury, we have seen, when an action at law is brought, may take an equitable view of the facts and circumstances,² and such is clearly the principle by which courts of admiralty are guided.³ A wilful collision will justify exemplary damages; but when it is the consequence of the want of due care, or of ignorance, the damages are merely compensatory.⁴ The case of *Smith v. Condry*, in the Supreme Court of the United States,⁵ decides the important principle, that the actual damage sustained at the time and place of the injury, and not the profits which probably might have been realized if the collision had not occurred, constitutes the just measure of damages to be awarded to the injured party. (*a*)

¹ The *Woodrop Sims*, 2 Dods. 83.

² *Ante*, §§ 639, 640.

³ *Ante*, §§ 641, 642.

⁴ *Steamboat Co. v. Whilldin*, 4 Harring. Del. 228; *Cummings v. Spruance*, 4 Harring. Del. 315.

⁵ *Smith v. Condry*, 1 How. U. S. 28. That the probable profits of the voyage are not the fit mode of ascertaining the damages in cases of marine torts, see *The La Amistad de Rues*, 5 Wheat. 385. The statute of 53 Geo. 3, c. 159, was passed to limit the responsibility of ship-owners in case of loss or damage from collision or other accident; the word “ship” occurs throughout the statute; in section 1, it is alone; in the following sections, the expression “value of the ship and her appurtenances” occurs not less than ten times. In a case of collision, the “*Dundee*” was at the

time sailing on a voyage to the Greenland fishery, having on board the necessary stores and implements for the taking of whales and other fish, and procuring and bringing home in casks the oil and blubber; a question arose whether section 1 of the statute was to be construed as if the words “with all appurtenances” had been inserted in that clause; and it was *held* that it should be so construed, and that whatever was on board of the ship for the object of the voyage and adventure on which she was engaged, belonging to the owner, constituted a part of the ship and her appurtenances within the meaning of that statute, and that the owner was liable to the extent of the value thereof for damage done to another vessel in the manner described by the act. *Gale v. Laurie*, 5 B. & C. 156.

(*a*) This is not now the law. Damages are given for the use of the vessel during the time lost by reason of the collision. *Barrett v. Williamson*,

§ 671. We conclude the perplexed subject of liability for damage occasioned by collision of vessels, by warning ship-owners, that it is important for them to bear in mind, that, in case of collision, they will not be absolved from the duty of rendering every assistance in their power to the ship which has been in error, for the safety of her cargo and her passengers. It is held, indeed, in the admiralty, to be a suspicious circumstance when effort has not been made to help the damaged vessel; and the owners of the "Celt," though not otherwise in fault, were condemned in all costs and expenses of the suit, because the master made no attempt to save the ship run down.¹ (a)

¹ The Celt, 3 Hagg. Adm. 321.

4 McLean, C. C. 589. Williamson v. Barrett, 13 How. 101, 111. Sturgis v. Clough, 1 Wall. 269. The Steamboat Rhode Island, 2 Blatchf. C. C. 113. The Clarence, 3 W. Rob. 283.

(a) See also The Ericsson, Swabey, Adm. 38; The Despatch, Swabey, Adm. 138; St. 25 & 26 Vict. c. 63, § 33; The Orinoco, Holt, 98; The Mexican, Holt, 130.

APPENDIX.

APPENDIX.

FORM OF A LIBEL IN A SUIT *IN REM* IN CASES OF COLLISION OF VESSELS UPON THE LAKES.

Libel in a Suit *in rem*, for Damages by Collision, under the Act of February 26, 1845,
“extending the Jurisdiction of the District Courts of the United States in certain
Cases upon the Lakes and navigable Waters connecting the same.”

IN ADMIRALTY. { To the Judge of the District Court of the United States
for the District of —.

A. B. of —, —, owner of the schooner Sylph hereinafter mentioned, exhibits this his libel against the steamboat Vixen (whereof C. D. is or lately was master), now lying in the port of —, in the district of —, aforesaid, and within the admiralty and maritime jurisdiction of this Honorable Court; her engine, machinery, boats, tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. That the said schooner Sylph is a vessel of more than twenty tons' burden, to wit, of the burden of — tons or thereabouts; and at the time when the cause of action hereinafter mentioned and set forth, arose, was enrolled and licensed for the coasting trade, and was employed in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and navigable waters connecting the said lakes.

Second. That on the — day of —, in the year —, the aforesaid schooner, being tight, stanch, and well manned and provided, sailed from the port of Sandusky, in the State of Ohio, with a valuable cargo of wheat, on a voyage to the port of Buffalo, in the State of New York.

Third. That during the said voyage, to wit, about eleven P. M. of the — day of —, the said schooner being then about eight miles westerly from Cleveland, with the wind blowing hard from the east-southeast, and the said schooner being close-hauled on the starboard tack, her course lying east-northeast, R. T., the first mate of the said schooner, who then had the

watch and was the commanding officer on deck, being on the lookout, descried lights ahead, and soon after discovered that they were borne by a steamboat approaching the said schooner in a southwesterly direction, apparently about one mile distant, and then bearing about one point on her lee bow. That as soon as the said R. T., mate as aforesaid, had discovered the approach of the said steamboat, he informed the helmsman of the said schooner thereof, and ordered him to keep her steady, believing that the said steamboat would pass her on the larboard hand. That about three minutes after the said order was given, it became apparent to the said mate that there was ground to apprehend a collision with the said steamboat; and within one or two minutes thereafter, he became satisfied that such collision was inevitable, unless proper means were immediately resorted to by the persons having charge of the said steamboat, to prevent the threatened disaster. Whereupon, the said steamboat having in the meantime approached within speaking distance, the said R. T., mate as aforesaid, instantly shouted, "Port your helm! Stop your engine!" and several times repeated this request, and continued to do so, in a loud and audible voice, until, about a minute and a half after first hailing the said steamboat, she struck the said schooner, stem on, on her larboard bow, and so greatly injured the said schooner that she immediately began to fill with water, and, in spite of the most strenuous exertion on the part of all on board to keep her afloat, she soon thereafter sunk, and was, with her cargo, totally lost; her officers and crew having with difficulty saved their lives, by getting on board the said steamboat.

Fourth. That the said steamboat by which the said damage had been done proved to be the Vixen aforesaid, under the command of G. H. as master thereof, and being of about — tons burden, bound on a voyage from Buffalo aforesaid to Detroit. That at the time when her lights were first discovered from the Sylph as hereinbefore mentioned, the Sylph carried a light suspended from the outer end of her bowsprit, (a) which remained there until she was struck by the Vixen; and although there was considerable haze on the water, the said light could easily have been seen, and, if she kept a good lookout, must have been seen by her at the distance of half a mile, or at least of a quarter of a mile, and in season to have enabled her to give way for the said Sylph, as she was bound to do, and thereby to prevent a collision therewith.

Fifth. That if, at the time the said Vixen was first hailed from the Sylph, and thenceforth, she had had a proper watch on deck, the warning given by the mate of the Sylph as hereinbefore mentioned must have been distinctly heard on board the Vixen in season to have enabled her

(a) This would not be sufficient under the act of 1864, c. 69. The usual allegation is: "The lights required by law were duly set."

by putting her helm to port, to pass the Sylph in safety; or, by immediately stopping her engine, greatly to diminish the violence of the blow. But instead of so doing, the said steamboat Vixen kept on her previous course; and although she was running at the rate of twelve knots an hour, her speed was not slackened; and the aforesaid G. H., master of the said Vixen, admitted to the aforesaid R. T., mate of the Sylph, soon after the said R. T. got on board the Vixen, that her engine had not been stopped.

Sixth. That at the time when the danger of a collision between the said vessels was first perceived as aforesaid from the Sylph, it was impossible for her to get out of the way of the said Vixen; nor were there any means to which she could with propriety have resorted for that purpose.

Seventh. That at the time of the aforementioned loss of the said schooner Sylph and her cargo, the libellant was the true and lawful owner of the said schooner, and of her said cargo; and that the said schooner was of the value of — dollars, and the said cargo was of the value of — dollars or thereabouts; and that by reason of the careless, negligent, unskilful, and improper management of the said steamboat Vixen, and of the collision thereby occasioned of the said steamboat with the said schooner Sylph, the libellant hath sustained damages to the amount of — dollars or thereabouts, for which he claims reparation in this suit.

Eighth. That all and singular the premises are true.

Wherefore the libellant prays that process in due form of law may issue against the said steamboat, her engine, machinery, boats, tackle, apparel, and furniture; and that this Honorable Court will pronounce for the damages aforesaid, and decree the same to be paid with costs, and for such other and further relief and redress as to right and justice may appertain, and the court is competent to give in the premises.

(Signed)

A. B., *Libellant.*

G. H., *Proctor.*

On the — day of —, appeared personally A. B., the above-named libellant, and was sworn to the truth of the foregoing libel.

Before me, J. K., *Clerk* [or *Commissioner*].

For damage by collision, a suit *in rem* and *in personam* against the offending ship and the master, or a suit *in personam* against the master or the owner, may also be maintained; and there can be little difficulty in adapting the foregoing precedent to either of these forms of remedy.

ENGLISH FORMS OF PLEADINGS BY AND AGAINST CARRIERS.

[SEE *Infra*, CHAPTER X.]

From "Law of Carriers," by Chitty and Temple.

Commencement of a Declaration.

IN the Queen's Bench¹ [*or* "Common Pleas," *or* "Exchequer of Pleas"].

On the — day of —,
A. D. 1856.¹

[*Venue.*] A. B. by — his attorney [*or*, "in person"] sues C. D. for that [*here state the special ground of action commencing a second or subsequent count*].

"And also for that," &c. [*If the plaintiff has any claim recoverable under an indebitatus count, such count should be added to the declaration, commencing*] —

"And the plaintiff also sues the defendant for money payable² by the defendant to the plaintiff for," &c.

[*Conclude as follows.*] And the plaintiff claims £ —.

Forms of Indebitatus Counts.

A. B. by — his attorney, [*or in person*] sues C. D. for money payable² by the defendant to the plaintiff.

¹ Every declaration and other pleading must be entitled of the proper court, and of the day of the month in the year when the same was pleaded. Com. Law Proc. Act, 1852, § 55. Or it may be set aside as irregular if the application for that purpose be promptly made. *Hodgson v. Rennell*, 4 M. & W. 373. *Mills v. Brown*, 9 Dowl. 151. *Newnham v. Hanney*, 5 Dowl. 259. Or the court or a judge may give leave to amend. Com. Law Proc. Act, § 222.

² The omission of these words would make the declaration bad on general demurrer. *Place v. Potts*, 8 Exch. 705, unless, perhaps, where the plaintiff's claim is founded on an account stated. *Tagg v. Nudd*, 3 Ell. & B. 650. But the defect is cured by verdict, or by defendants pleading over. *Wilkinson v. Sharland*, 24 Law J. Exch. 116. The whole of the money claims form but one count on several executed considerations. *M'Gregor v. Graves*, 3 Exch. 34.

For the carriage of goods carried and conveyed by the plaintiff in carts and other vehicles for the defendant at his request.¹

For the tonnage of goods carried by the plaintiff on a certain canal in boats and vessels for the defendant at his request.²

For freight (primage and average,³ *if claimed*), for the conveyance by the plaintiff for the defendant, at his request, of goods in ships.⁴

For the demurrage of a ship of the plaintiff kept on demurrage by the defendant.⁵

For the lighterage, and for the shipping, conveyance, and landing of goods by the plaintiff for the defendant at his request.

For wharfage and warehouse room for goods provided by the plaintiff for the defendant at his request.

For the passage of the defendant in and on board of a certain vessel of the plaintiff at the request of the defendant.

For money had and received by the defendant for the use of the plaintiff.⁶

For money paid by the plaintiff for the defendant at his request.

And for money found to be due from the defendant to the plaintiff upon accounts stated between them.

And the plaintiff claims £——.

*Declaration in Contract against a Carrier for not carrying and delivering Goods within a Time agreed upon.*⁷

For that the defendant, before and at the time of the making of his promise hereinafter mentioned, was a common carrier of goods for hire,

¹ The breach of an agreement to carry goods in consideration of the carriage of other goods, which is executed by the carriage of the goods, will not support this count, because the defendant was not to pay money. *Atkinson v. Smith*, 14 M. & W. 895. *Bracegirdle v. Hinks*, 9 Exch. 381. 2 Com. Law Rep 991.

² 3 Wentw. 70.

³ *Ante*, Chap. X.

⁴ This is the form given by the Com. Law Proc. Act, 1852, but a delivery must be proved where it is sought to charge the consignee or indorsee of the bill of lading. *Ante*, Chap. X.

⁵ As to the claim for demurrage, *Ante*, Chap. X.; where there is a contract express or implied to pay demurrage, this count will suffice if the contract is not under seal. *Lear v. Yates*, 3 Taunt. 389. If there be no contract, but the defendant has detained the vessel longer than is allowed by usage of the port of discharge,

the action should be special. Per Parke, B., *Horn v. Bensusan*, 2 M. & Rob. 326; 9 C. & P. 709, S. C. *Kell v. Anderson*, 10 M. & W. 499, per Lord Abinger. Nor will this form be proper where the detention is *ex delicto*. *Harrison v. Wilson*, 2 Esp. R. 707. See form of declaration by the master of a ship on the bill of lading against the consignee for not receiving the goods from the ship in a reasonable time. *Chit. Jun. Prec. Pleading*, 99. *Granger v. Dacre*, 12 M. & W. 432.

⁶ When an excessive sum has been demanded by a carrier for the carriage of goods, and paid under protest, the excess may be recovered back under this count, although the plaintiff made no tender of any specific sum for the carriage of the goods. *Ashmole v. Wainwright*, 2 Q. B. 837. *Ante*, Chap. X.

⁷ The law implies a duty on the part of a common carrier to deliver goods in a

that is to say, from *Aylesbury* to *London*, and in consideration that the plaintiff would deliver to him as such carrier, at his request, certain goods of the plaintiff, that is to say [*twelve baskets containing poultry and butter*], to be carried by the defendant from *Aylesbury* to *London*, and there to be delivered by the defendant to the plaintiff for reward to the defendant; the defendant promised the plaintiff to carry the said goods from *Aylesbury* to *London*, and there deliver the same to the plaintiff before — o'clock of the day then following, and although the plaintiff delivered the said goods to the defendant, and he received the same for the purpose aforesaid, yet the defendant did not carry or deliver the said goods within the time aforesaid, and the said goods were not delivered to or received by the plaintiff until the expiration of a long time after the same should have been delivered to him. Whereby the said goods were damaged and spoiled, and the plaintiff also lost a market and the means and opportunity of selling the same, and was deprived of divers profits which otherwise would have accrued to him, and thereby also the plaintiff incurred expenses in endeavoring to obtain the said goods.¹ And the plaintiff claims £——.

Declaration in Contract against a Carrier by Water for not delivering Goods or giving the Consignee Notice of their Arrival, according to his Contract.

For that, in consideration that the plaintiff, at the request of the defendant, had caused to be delivered to him certain goods of the plaintiff, that is to say [*twenty bales of bacon*], to be by the defendant carried in a certain barge or vessel from — to —, in order that upon their arrival there the goods might be forwarded or sent or delivered by the defendant to one —, at —, and there delivered to him for the said plaintiff, or otherwise that the defendant might upon the arrival of the said goods at —, or within a reasonable time then next following, notify such arrival to the said — at — aforesaid, for reward to the defendant in that behalf, he the defendant promised the plaintiff to convey such goods to — aforesaid, and that he the defendant would within such reasonable time forward or send or deliver the same to the said — as aforesaid, or notify or cause to be notified to the said — at — aforesaid the arrival of the said goods at — aforesaid, and although the defendant had and received the said goods for the purpose aforesaid, and although afterwards the defendant conveyed the goods to —, and they then arrived there, and although a

reasonable time; and where a defendant is charged upon a breach of such duty, the form of declaration may be varied to meet the case of any special contract for the carriage of the same.

¹ Any special damage sustained by the

plaintiff, must be averred. See a form, *Pickford v. Grand Junction Railway Co.*, 12 M. & W. 766. But the damage must not be too remote. *Ante*, Chap. X. and *Mann v. The General Steam Navigation Co.*, Exch. Jan. 28, 1856.

reasonable time for forwarding and sending, or delivering the same, or notifying the arrival thereof as aforesaid, had elapsed before the commencement of this suit, yet the defendant, not regarding his said promise, did not forward or send or deliver the said goods for the plaintiff to the said ——— t ——— aforesaid, within such reasonable time as aforesaid, or at any other time, or notify or cause to be notified to the said ——— within such reasonable time, or at any other time, such arrival of the said goods; but the defendant wholly neglected and refused so to do, and wrongfully detained the same in his possession for a long and unreasonable time, without sending or forwarding or delivering the said goods, or causing them to be delivered to the said ——— for the said plaintiff, or otherwise notifying or causing to be notified to the said ——— the arrival of the same as aforesaid, and by reason thereof the said ——— refused and declined to accept and purchase and pay for the same, as he otherwise would have done for divers large sums of money, whereby the plaintiff hath been deprived of the gains and profits which would otherwise have accrued to him, and hath lost other opportunities of disposing of the said goods for divers large sums of money, and the benefit of the profits which would otherwise have arisen herefrom, and hath incurred expenses in endeavoring to obtain the goods, and the same are injured and lessened in value. And the plaintiff claims £——.

Declaration in Tort, against a Carrier on his Common-Law Liability for refusing to carry Goods.¹

For that the defendant was a common carrier of goods for hire from ——— to ———, and the plaintiff, at a reasonable and proper time in that behalf, tendered and offered to the defendant at ——— aforesaid, at the place used by him in the way of his said business for the receipt of parcels and goods to be carried by him as such carrier, certain goods of the plaintiff, that is to say, ———, and requested the defendant, as such common carrier, to carry the same from ——— to ——— aforesaid, for reward to the defendant in that behalf, and the plaintiff was then ready and willing² to pay to the defendant his reasonable hire and reward in that behalf, of which the defendant had notice; and although the defendant could and ought to have received and carried the said goods, and had ample room and convenience and accommodation for receiving and carrying the same, and the said goods were of a description usually carried by the said defendant, yet the defendant, not regarding his duty³ in that behalf, did not nor would, al-

¹ As to the duty of carriers to receive and carry all goods offered to them, and when they are excused from doing so. *Ante*, Chap. X.

² It is not necessary to aver a tender

of the price of carriage; a readiness to pay is sufficient. *Ante*, Chap. X.

³ It is not necessary to aver what the duty is; this is implied from the allegation that the defendant was a com-

though he then received and carried goods for other persons, receive and carry the said goods for the plaintiff, but wholly refused so to do, whereby, &c. [*Here allege any special damage sustained by the plaintiff.*¹ *As to the damage, ante, 142.*] And the plaintiff claims £——.

[*See Form of Declaration in Tort against Railway Companies as Common Carriers, for refusing to carry Goods.*²]

*Form of Declaration in Tort for not delivering Goods in a reasonable Time, and for Loss of the Goods.*³

For that the defendant was a common carrier of goods for hire from —— to ——, and the plaintiff delivered to the defendant, and he received, as such carrier, goods of the plaintiff [that is to say, a hamper of wine], to be carried by the defendant, as such common carrier, from —— to —— aforesaid, and there to be delivered by the defendant for the plaintiff within a reasonable time, in that behalf⁴ for reward to the defendant; yet the defendant, neglecting his duty⁵ as such common carrier, did not safely or securely carry or convey the said goods from —— to —— aforesaid, nor safely or securely deliver the same there for the plaintiff, although a reasonable time for doing so had elapsed before the commencement of this suit: but then negligently and improperly⁶ lost the said goods. And the plaintiff claims £——.

A shorter Form of Declaration against a Common Carrier for losing or damaging Goods.

For that the defendant lost [*or damaged*] the plaintiff's goods, that is to say, ——, which the plaintiff had delivered to the defendant as a com-

mon carrier of goods for hire. *Ante*, Chap. X.

¹ See special damage alleged in *Pickford v. Grand Junction Railway Co.*, 8 M. & W. 372.

² *Pickford v. Grand Junction Railway Co.*, 8 M. & W. 372; 9 Dowl. 766, S. C. *Crouch v. The London and North-Western Railway Co.*, 14 Com. B. 255. *Crouch v. The Great Northern Railway Co.*, 9 Exch. 556.

³ See a form of declaration against a railway company for loss of a parcel. *Muschamp v. Lancaster, &c. Railway Co.*, 8 M. & W. 422. *Palmer v. Grand Junction Railway Co.*, 4 M. & W. 749, 7 Dowl. 282, S. C. Against a cabman for loss of

a passenger's luggage. *Ross v. Hill*, 2 Com. B. 877. Against a carrier from the London terminus of a railway for the loss of goods. *Coats v. Chaplin*, 3 Q. B. 483.

⁴ This duty to deliver in a reasonable time is implied by law. *Raphael v. Pickford*, 5 M. & G. 556, 2 Dowl. N. S. 917, S. C.

⁵ The declaration need not aver what such duty is; it is implied by law. *Per Maule, J.*, *Benett v. Peninsular and Oriental Steamboat Co.*, 6 Com. B. 785; *Brown v. Mallett*, 5 Com. B. 599.

⁶ It is not necessary to aver or prove negligence against a common carrier when charged on his common-law liability. *Ante*, Chap. X.

mon carrier of goods for hire, and which he had received as such carrier, to be carried by him for the plaintiff for reward to the defendant in that behalf.

*Declaration in Tort against a Railway Company for Loss of a Passenger's Luggage.*¹

For that the defendants were the owners and proprietors of a certain railway, called [The London and Brighton Railway,] and of certain carriages used by them for the carriage and conveyance of passengers and goods upon the said railway, for hire and reward to them the said defendants in that behalf, and thereupon the plaintiff became and was received by the said defendants as a passenger in one of the said carriages of the defendants, at their request, to be by them safely and securely carried thereby, together with his luggage, that is to say, [a certain portmanteau containing the wearing apparel of the plaintiff,] on a certain journey from London to Brighton, for reward to the defendants in that behalf, yet the defendants, not regarding their duty in that behalf, did not use due and proper care in and about the carriage and conveyance of the plaintiff's said luggage by and upon the said railway from London to Brighton aforesaid,² but wrongfully lost the same. And the plaintiff claims £ ———.

*Declaration against the Captain of a Vessel on the Bill of Lading.*³

For that the plaintiff, at the request of the defendant, caused to be delivered to the defendant divers goods, that is to say, [*here specify them,*] of the plaintiff, to be carried by the defendant in and by a certain ship of the defendant called ———, from ——— to ———, and there to be delivered to the plaintiff for freight and reward to the defendant in that behalf (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted).⁴ And the defendant then received the same accordingly, for the purpose aforesaid; and although the said ship afterwards safely arrived at ——— aforesaid, and no act of God, nor the Queen's enemies, nor fire, nor any danger or accidents of

¹ Carriers of passengers are, with respect to the luggage of passengers, liable in the same degree as common carriers of goods. *Ante*, Chap. X.

² This averment of negligence is not necessary. *Ante*, Chap. X.

³ See another form, *Colvin v. Newberry*, 8 B. & C. 166. See a form of declaration for bad stowage, *Major v.*

White, 7 C. & P. 41; *Anderson v. Chapman*, 5 M. & W. 483, 7 Dowl. 822, S. C. And see form against ship-owner for negligent delay by the captain, *Leslie v. Wilson*, 6 Moore, 415, 3 B. & B. 171, S. C.

⁴ This must agree with the terms of the bill of lading. See the form of a bill of lading, *ante*, Chap. X.

the seas, rivers, or navigation, prevented the safe carriage or delivery of the said goods as aforesaid, yet the defendant did not deliver the said goods to the plaintiff, but so negligently, carelessly, and improperly conducted himself in this behalf, that, for want of due care in the defendant and his servants in that behalf, the said goods became and were wholly lost to the plaintiff. And the plaintiff claims £——.

*Declaration in Tort against the Master of a Vessel for a Deviation during the Voyage, whereby the Vessel was wrecked and the Plaintiff's Goods lost.*¹

For that the plaintiff delivered to the defendant, then being the master of a certain ship called ——, and the defendant received from the plaintiffs on board of the said ship certain goods of the plaintiff, that is to say, [here describe the goods,] to be by the defendant carried in the said ship from —— to —— (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, excepted),² for reward, to be therefor paid by the plaintiff to the defendant; and the defendant departed and set sail with the said ship, with the said goods on board of the same. Yet the defendant, not regarding his duty in that behalf, did not proceed with the said ship from —— to —— aforesaid [although not prevented by the acts, matters, and things excepted as aforesaid, or any of them], by and according to the direct, usual, and customary way and passage, without any voluntary and unnecessary deviation or departure from or delay or hindrance in the same, but, on the contrary thereof, afterwards, and before the arrival of the said ship at ——, without the knowledge, and against the will of the plaintiff, voluntarily and unnecessarily deviated and departed from and out of such usual and customary way, course, and passage with the said ship, so having the said goods on board of the same. And the said ship, so having the said goods on board of the same as aforesaid, was, by reason of such deviation, departure, and before her arrival at —— aforesaid, exposed to and assailed by a great storm and a great and heavy sea, and was thereby driven on shore, wrecked, and greatly shattered and broken; and by means thereof the said goods of the plaintiff were wetted, damaged, spoiled, sunk in the sea, and wholly lost to the plaintiff. And the plaintiff claims £——.

*Declaration in Tort against a Ferryman for negligently landing Goods.*³

¹ As to the law on this subject, see *ante*, Chap. X. lading, if any, under which the goods were shipped.

² According to the terms of the bill of ³ Walker v. Jackson, 10 M. & W. 161.

*Declaration in Tort against a Carrier by Water for Damage done to a Cargo.*¹

*Declaration for the wrongful Conversion of Goods.*²

For that the defendant converted to his own use and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that to say "a portmanteau containing wearing apparel" [*or other short description of the goods*]. And the plaintiff claims £ —.

*Declaration for the wrongful Detention of Goods.*³

For that the defendant detained from the plaintiff the goods of the plaintiff, that is to say, a deed box containing the title-deeds and writings relating to a certain estate called Mount Pleasant, in the county of Kent, that is to say, a certain indenture made between, &c. [*describing the deeds partly as in a schedule of them*⁴]; and the plaintiff claims a return of the said goods, or their value,⁵ and £ — for their detention.

*Declaration in Contract against a Coach Proprietor for not carrying a Passenger.*⁶

For that the defendant was the owner and proprietor of a certain stage-coach, going and passing from — to —, for the carriage and conveyance therein of passengers and their luggage for hire; and thereupon, in consideration that the plaintiff, at the request of the defendant, would take and engage a place or seat in the said coach of the defendant, to be carried and conveyed therein as a passenger, from — to —, together with his luggage, at and for certain reasonable hire or reward, to be [*or, if already paid, omit to be*] therefore paid by the plaintiff to the defendant, he the defendant promised the plaintiff to carry and convey the plaintiff, together with his said luggage, in and by the said coach or carriage, from — to — aforesaid, and the plaintiff saith that, although he did take and engage a place or seat in the said coach or carriage, to be carried and conveyed,

¹ *Bennion v. Davison*, 3 M. & W. 183.

² As to when this form of declaration is sustainable, and what amounts to a conversion, see *ante*, Chap. X. *Eastern Counties Railway Co. v. Brown*, 6 Exch. 20; 20 Law J. 196.

³ This action lies although the defendant wrongfully parted with the goods before the commencement of the action. *Essex v. Dowle*, 9 M. & W. 19.

⁴ As to the description of the goods, *Graham v. Gracie*, 13 Q. B. 548; 2 Ind. 74 *e.* It is not necessary to men-

tion the date of a deed. *Alcorn v. Westbrook*, 1 Wils. 116.

⁵ The value of the goods must be assessed by the jury, and, if several articles are sought to be recovered, the value of each should be separately assessed. *Phillips v. Jones*, 15 Q. B. 780; *Williams v. Archer*, 5 Com. B. 358. As to the writ of execution, see *ante*, Chap. X.

⁶ See other forms against stage-coach proprietors. 2 Chit. on Pleading, 266.

together with his said luggage, in and by the said coach or carriage, from — to — aforesaid, and although the plaintiff was ready and willing to be carried and conveyed, together with his said luggage, in or by the said coach, from — to — aforesaid, and the plaintiff then requested the defendant to carry and convey the plaintiff, together with his said luggage, in or by the said coach, from — aforesaid to — aforesaid, yet the defendant did not nor would, when he was so requested as aforesaid, or at any other time, carry or convey the plaintiff, together with his said luggage, or otherwise, in or by the said coach, from — to — aforesaid; but then wholly neglected and refused so to do, whereby he the plaintiff was forced and obliged to procure another conveyance to — aforesaid, and was thereby put to great trouble and inconvenience, and to great expense of his moneys, and was and is otherwise greatly injured and damnified. [*State any special damage the plaintiff may have sustained. Add an indebitatus count for money had and received to recover back the fare, if any paid by plaintiff to the defendant, and on an account stated.*] And the plaintiff claims £ —.

Declaration in Tort against a Steamboat Company who were Carriers of Passengers, for refusing to carry the Plaintiff.¹

For that the defendants were possessed of a certain steam-vessel called the "Montrose," lying at Southampton, and about to sail for a place beyond the seas, to wit, Gibraltar, in Spain, for the carriage of passengers from Southampton to Gibraltar; and the plaintiff was desirous of becoming a passenger in and on board of the said steam-vessel, from Southampton to Gibraltar; and at a reasonable and proper time, in that behalf tendered himself to the defendants at Southampton aforesaid, to be carried by them as such passenger, in and on board the said steam-vessel, from Southampton to Gibraltar; and requested the defendants to receive him as such passenger in and on board the said steam-vessel, to be carried, and to carry him from Southampton to Gibraltar; and the plaintiff was then in a fit and proper state to be carried by the defendants as such passenger, and was ready and willing to pay the defendants all reasonable passage-money, hire, and reward for being carried by them as such passenger from Southampton to Gibraltar, of which the defendants had notice, and although the defendants had sufficient room and accommodation in and on board the said steam-vessel, to receive the plaintiff in and on board the same as such passenger,

¹ This was the form of declaration in Benett v. The Peninsular and Oriental Steamboat Co., 6 Com. B. Rep. 775, and ante, Chap. X. And may be readily altered so as to charge a railway company or other carrier by land. See also a

form of declaration against the captain of a ship for excluding the plaintiff, a passenger, from the cuddy. Prendergast v. Compton, 8 C. & P. 454, cited, ante, Chap. X.

and to carry him, as such passenger, from Southampton to Gibraltar, yet the defendants disregarded their duty in that behalf, and did not nor would receive the plaintiff as such passenger in and on board the said steam-vessel, or carry the plaintiff therein from Southampton to Gibraltar, but wholly neglected and refused so to do, and then caused the said steam-vessel to sail; and the same then sailed from Southampton to Gibraltar without the plaintiff. [*Aver any special damage sustained by the plaintiff.*] And the plaintiff claims £——.

*Declaration in Tort against a Railway Company for Injury to the Plaintiff, a Passenger.*¹

For that the defendants were common carriers of passengers and goods upon and along certain railways, from —— to ——, for reward to the defendants in that behalf; and thereupon the plaintiff, at the request of the defendants, became and was a passenger, and was received by the defendants in one of their carriages, to be by them safely and securely carried and conveyed thereby from —— to ——, for reward to the defendants in that behalf; and thereupon it became and was the duty of the said defendants to use due and proper care and skill in and about the carrying and conveying the plaintiff on the said journey; yet the defendants did not use due and proper care or skill in and about the carrying the plaintiff on the said journey, but so negligently and unskilfully conducted themselves in that behalf, and in conducting, managing, and directing the carriage in which the plaintiff was such passenger as aforesaid, and the train to which the same was attached, and the engine whereby the said train was drawn upon and along the said railways, that the carriage which contained the plaintiff was thrown and cast with great violence from and off the rails of the railway, and was overturned, crushed and broken to pieces,² and thereby the plaintiff was bruised, wounded, and injured; and became and was sick, &c., and incurred expenses. And the plaintiff claims £——.

*Declaration in Tort under the 9 & 19 Vict. c. 93, against a Carrier of Passengers, by the Executor of a Passenger who was killed during a Journey by the Negligence of the Defendants.*³

A. B., executor of the last will and testament of E. F., deceased, by ——, his attorney, sues C. D. For that [*proceeding to allege that the tes-*

¹ See other forms in *Carpue v. London and Brighton Railway Co.*, 5 Q. B. 747; *Curtis v. Drinkwater*, 2 B. & Ad. 169, against a coach proprietor for negligently driving a coach. In *Brien v. Bennett*, 8 C. & P. 724, cited *ante*, Chap. X., against

an omnibus proprietor for driving on whilst plaintiff was on the step, and throwing him down.

² This may be varied to meet the circumstances of the particular case.

³ See the statute considered by Chitty

tator became a passenger and was injured, as in the preceding form, but substituting the name of the testator for "the plaintiff," and stating the facts to have happened "in his lifetime," and then aver as follows.] And the plaintiff further saith, that by reason of the said several hurts, bruises, and wounds, so occasioned to the said E. F. in his lifetime as aforesaid, the said E. F. afterwards, and within twelve calendar months next before the commencement of this suit, died; ¹ and the plaintiff, as executor as aforesaid, for the benefit of the wife (*or other relatives of the deceased*) of the said E. F., according to the form of the statute in such case made and provided, claims £——.

FORMS OF PLEAS IN ACTIONS BY AND AGAINST CARRIERS.³

In the Queen's Bench [*or Common Pleas, or Exchequer of Pleas*].

On the —— day of ——,
A. D. 1856.

D. } And the defendants by ——, his attorney [*or "in person"*], says
ats } that he never was indebted ⁴ [*or "did not promise"* ⁵] as alleged.
B. }

Form of Plea of not Guilty to an Action of Tort against a Carrier.

And the defendant by ——, his attorney [*or "in person"*], says that he is not guilty, as alleged.⁶

and Temple; the particulars of the persons on whose behalf the action is brought, and of the nature of the claim, must be delivered with the declaration. See Form of Particulars, Chitty's Forms, 803. And see a form of declaration in contract by an administratrix against a coach proprietor for negligence, whereby the intestate, a passenger, was injured and died; alleging, as special damage, that the intestate's personal estate was injured. Chit. Jun. Prec. Pleading, 107, and see *ante*, Chap. X.

¹ Or if the testator was killed at the time of the accident, alter the declaration accordingly.

² See *ante*, Chap. X., as to the persons

for whose benefit the action may be brought.

³ The general form of replication will be, that the plaintiff joins or takes issue upon the defendant's pleas. Com. Law Proc. Act, 1852, § 79.

⁴ This would be the proper form of plea to the *indebitatus* counts.

⁵ This plea would be applicable to the declarations. As to what this plea puts in issue, *ante*, Chap. X.

⁶ As to the effect of this plea and what it puts in issue. This would also be the proper plea to put in issue a conversion by a carrier sued in trover, but would not deny the plaintiff's property in the goods, or enable the defendant to set up a lien.

Plea of Non Detinet to a Declaration for Detention of Goods.

And the defendant by —, his attorney [or in person], says that he did not and doth not detain the said goods, or any or either of them as alleged.

Plea to a Declaration in Contract against a Carrier for not safely carrying and delivering Goods, that Defendant did safely carry and deliver them.

And for a *second*¹ plea to the *first* count, the defendant says that he did carry the said goods to —, and deliver the same to the plaintiff within the time agreed upon.²

Plea to an Action of Tort, denying the Bailment to the Defendant.

And for a *second* plea as to, the *first* count the defendant says that the said goods were not delivered by the plaintiff to the defendant for the purpose alleged.³

Plea to an Action of Tort, denying that the Defendant was a Common Carrier.

That the defendant was not a common carrier of goods for hire as alleged.⁴

Plea under the Carriers' Act, 1 Wm. 4, c. 68, to a Declaration for losing a Parcel, that it contained Title-Deeds, and that the Nature and Value thereof was not declared, or an increased Rate of Charge paid.

And for a *second* plea,⁵ the defendant says that the said *parcel* in the

¹ Each plea must be written in a separate paragraph, and numbered. Com. Law Proc. Act, 1852, § 67. No formal commencement or conclusion is required to pleas. *Id.*

² This would be the proper form of plea to the declaration. As to what is a performance of the carrier's contract or duty, and a sufficient delivery by him, *ante*, Chap. X. If the defendant pleads that he did not promise, this puts in issue that the defendant was a common carrier, and the delivery of the goods to him in that capacity. If the defence be that the goods were improperly packed, or that the goods were stopped *in transitu* by the consignor, or that the goods were not insured under the Carriers' Act, these defences must be specially pleaded.

³ This plea renders it necessary for the plaintiff to prove a delivery of the goods to the defendant or his servant, upon the bailment alleged in the declaration, but does not put in issue that the defendant was a common carrier, or his liability in that capacity. As to what is a sufficient delivery to charge a carrier by land; or by water. As to the delivery of a passenger's luggage, *ante*, Chap. X.

⁴ This plea puts in issue the fact that the defendant carried on the business of a common carrier, but does not raise any question as to his duty to carry. See per Maule, J., *Benett v. Peninsular and Oriental Steamboat Co.*, 6 Com. B. 775. *Ante*, Chap. X.

⁵ If the parcel or package lost contained several articles, some of which were

declaration mentioned contained *only title-deeds*,¹ which at the time of the delivery thereof to the defendant, and when the same were lost as aforesaid, exceeded in value the sum of £10; and that the said parcel was delivered by the plaintiff to the defendant, as a common carrier by *land*,¹ of goods for hire [to be carried and conveyed from and to the places in the declaration mentioned] at a certain office or receiving-house of the defendant for the receipt of goods to be carried by him as such common carrier as aforesaid: and the defendant further says, that when the said parcel was so delivered at the said office, there was affixed, according to the form of the statute in such case made and provided, in legible characters, in a public and conspicuous part of the said office, a notice,² whereby he, the said defendant, notified that a certain increased rate of charge therein mentioned was required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of (amongst other things) *title-deeds*; and the defendant further says, that at the time of the delivery of the said parcel at the said office as aforesaid, the value and nature thereof were not declared by the person sending or delivering the same, and neither the said increased charge was paid to nor was any engagement to pay the same accepted by the person receiving the same at the said office.

*Replication to the above Plea: that the Parcel was feloniously stolen by the Defendant's Servants, through the gross Negligence of the Defendant.*³

And as to the *second* plea, the plaintiff says that, whilst the said parcel was in the charge and possession of the defendant as such common carrier as aforesaid, the same was, by and through the *gross* carelessness and negligence of the defendant, unlawfully and feloniously stolen, taken, and carried away by a certain then servant of the defendant [to wit, one E. F.], whereby the same was not safely and securely carried or conveyed, or delivered as aforesaid, but then was and is wholly lost to the plaintiff, solely by reason of such felonious act.

not of the description specified in the Carriers' Act, the plea must be confined to those articles which are within the act, and which together exceeded in value £10. See the form in *Hearn v. London and South-Western Railway Co.*, 10 Exch. 793; 3 Com. Law Rep. 597, S. C.; and see other forms in *Syms v. Chaplin*, 6 Ad. & E. 634; *Hinton v. Dibbin*, 2 Q. B. 646; *Brind v. Dale*, 8 C. & P. 206; *Davey*

v. Mason, 1 Car. & M. 46; Chit. Prec. Pl. 293.

¹ The statute only applies to common carriers by land. *Ante*, Chap. X.

² As to the necessity for affixing this notice, and what is a compliance with the Act of Parliament.

³ See *Butt v. The Great Western Railway Co.*, 11 Com. B. 153; *Finucane v. Small*, 1 Esp. 315; *Hinton v. Dibbin*, 2 Q. B. 646.

*Plea to a Declaration in Tort for not delivering a Cask of Beer, that the Cask was an insufficient one and burst, whereby the Beer was lost, and could not be delivered.*¹

And for a *second* plea, as to the not safely and securely delivering the said cask of beer for the plaintiff, the defendant says, that at the time the said beer was delivered to him the same was contained in a certain cask, which was then, and at the time of the loss hereafter mentioned, a bad and insufficient cask, and not properly secured and coopered in that behalf, without any default on the part of the defendant; for which reason the said cask afterwards, and before the defendant could safely and securely deliver the said cask with the beer therein, for the plaintiff as aforesaid, broke, burst, and gave way, and the said beer therein then escaped from the said cask and was wholly wasted and lost, without the defendant's default, whereby he was prevented from delivering the said cask of beer for the plaintiff, as he otherwise would have done.

*Plea to an Action by the Consignee of Goods for not delivering them, that the Consignor gave Notice to the Carrier and stopped the Goods in transitu.*²

Plea by the Owner of a Ship sued for a Loss of Goods.

That the goods were "silver," &c., within the 17 & 18, Vict. c. 104, s. 503, that their nature and value were not declared in writing in the bill of lading or otherwise, and that they were stolen without the privity or default of the defendant.³

*Plea to an Action against a Carrier charged as a Wharfinger, that the Goods were destroyed by an accidental Fire.*⁴

Plea of the Statute of Limitations.

Says that the alleged causes of action did not accrue within six years next before the commencement of this suit.⁵

¹ This defence would not be admissible under a plea of not guilty. See the law on this subject, *ante*, Chap. X.; and see *Webb v. Page*, 6 Man. & G. 696, 1 D. & L. 581, S. C.; *Walker v. Jackson*, 10 M. & W. 161.

² *Jones v. Jones*, 8 M. & W. 431. See the law, *ante*, Chap. X.

³ See a form of plea, *Gibbs v. Potter*, 10 M. & W. 70. And see the law on this subject, *ante*, Chap. X.

⁴ *Bourne v. Gatcliffe*, 3 Scott, N. R. 1;

7 Man. & G. 850. 8 Scott, N. R. 604; 11 Cl. & F. 45, S. C.

⁵ 21 Jac. 1. c. 16, § 3. *Philpott v. Kelley*, 3 Ad. & E. 106. *Denys v. Shuckburgh*, 4 Y. & Col. 42. Actions by executors under Lord Campbell's Act must be commenced within twelve months after the testator's death. As to the limitation of actions against executors or administrators for injury to the personal estate of the testator or intestate, see 3 & 4 Wm. 4, c. 42, § 2.

Plea of Payment to an Action for the Carriage or Freight of Goods, &c.

Says that, before action, he satisfied and discharged the plaintiff's claim by payment.

Form of Plea of Payment into Court to a special Count against a Carrier for Non-Delivery of or Loss of Goods, or to a Count in Trover or Detinue, or for Injury to a Passenger.¹

And the defendant by —, his attorney, brings into court the sum of £—, and says, that the said sum is sufficient to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

¹ Carriers may pay money into court Com. Law Proc. Act, 1852, § 70. As to in all actions. 1 Wm. 4, c. 68, § 10. the effect of paying money into court.

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